No. 84-1181

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Question Presented

Whether the New York Court of Appeals erroneously construed the Fourth Amendment by holding that the actions of a police officer, who had lawfully stopped defendant's automobile for a traffic infraction and was attempting to routinely inspect the car's vehicle identification number (VIN), ordinarily viewable through the windshield, by pushing aside some papers on the dashboard which obstructed it, constituted an impermissible search of the vehicle.

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THE PEOPLE OF THE STATE OF NEW YORK,
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against

BENIGNO CLASS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioner respectfully prays for a writ of certiorari to review the judgment of the New York Court of Appeals entered in the above-captioned case on November 27, 1984.

Opinions Below

The opinion of the New York Court of Appeals, *People v. Class,* 63 N.Y.2d 491, —— N.Y.S.2d —— (1984), is appended hereto as Appendix A. The order of affirmance without opinion and dissenting opinion of the Supreme Court of the State of New York, Appellate Division, First Department, reported at 97 A.D.2d 741, 468 N.Y.S.2d 892 (1st Dept. 1983) is appended hereto as Appendix B.

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Jurisdiction

The decision of the New York Court of Appeals was entered on November 27, 1984. This Court's jurisdiction is invoked under 27 U.S.C. § 1257 (3).

Constitutional Provisions Involved

Amendment IV of the United States Constitution provides:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the United States Constitution provides, in part:

> Section 1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

The following statement of facts is taken from the opinion of the New York Court of Appeals. (Appendix A, pp. 1a-2a).

> On May 11, 1981, in the late afternoon, Police Officers Lawrence Meyer and William McNamee observed defendant driving 5 to 10 miles per hour above the speed limit, in a car with the windshield cracked on the passenger side. The officers drove along

side defendant's car and instructed him to pull over. Defendant followed this directive, emerged from his car and approached Officer Meyer, the driver of the police car. He provided Meyer with his registration and proof of insurance but stated that he did not have a driver's license in his possession. Meanwhile, Officer McNamee had gone directly to defendant's car, opened the door and checked the left door jamb for the vehicle identification number (VIN). Since the VIN was not located on the door jamb, McNamee reached in and moved papers on the dashboard to enable him to view the VIN. In doing so, he saw a handle of a gun protruding from underneath the seat, seized it, and defendant was promptly arrested.

The hearing court denied defendant's motion to suppress the gun. Although the court concluded that the officers had "no reason to believe the vehicle . . . was stolen" when defendant was stopped, it found their action reasonable in light of defendant's "immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession." Defendant then pleaded guilty to criminal possession of a weapon in the third degree and was sentenced to five years' probation. On appeal to the Appellate Division, the four Justice majority affirmed without opinion. The dissenting Justice found the search impermissible because "there was absolutely no predicate for believing the car was stolen."

The Decision of the New York Court of Appeals

In a 5 to 2 decision, the New York Court of Appeals reversed the order of the Appellate Division and ordered the suppression of the weapon and the dismissal of the indictment. In its opinion, the majority held that the officer's

conduct in opening the car door and reaching inside exposed "hidden areas" of the vehicle and, thus, constituted a search within the meaning of the Fourth Amendment. The majority concluded that a routine traffic infraction provided an insufficient predicate for that search. The dissent, however, found that there could be "no expectation of privacy" in a VIN which existed solely to "proclaim the identity of the vehicle" and, thus, its inspection was justified following a traffic infraction. The full texts of the majority and dissenting opinion appear in the appendix hereto.

REASONS FOR GRANTING THE WRIT

POINT

The decision below concerning the permissible scope of police intrusion into a vehicle's interior following a routine traffic violation raises an important and recurring question of Fourth Amendment law which this Court has never addressed.

In its decision below, the New York Court of Appeals construed the Fourth Amendment[1] as prohibiting a police

1. Although the New York Court of Appeals based its decision on the Fourth Amendment to the United States Constitution, it also purported to rely on Article I, § 12 of the New York Constitution. This oblique reference to the state constitution could not, however, constitute "an independent and adequate state ground" for the decision [*Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935)] and, thus, could not insulate the New York court's decision from this Court's review. *See, e.g. Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535, 1537 n. 1 (1983); *Michigan* v. *Long*, —— U.S. ——, 103 S. Ct. 3469, 3474 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 651-653 (1979); *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940). Indeed, after the mere mention of the New York Constitution in the opening paragraph of its opinion, the New York Court of Appeals

(footnote continued on next page)

officer, who had validly stopped an automobile for a traffic violation, from opening the vehicle's door and reaching inside to move some papers on the dashboard which obstructed his routine inspection of the vehicle identification number (VIN) located there. While this Court has recognized that "[v]ehicle stops for traffic violations occur countless times each day . . ." [*Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979)], it has never addressed the permissible scope of police intrusion into the interior of those "countless" vehicles stopped during routine traffic violations. *Accord Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *United States* v. *Robinson*, 414 U.S. 218 (1973) (both holding that police officers may order the driver to exit his vehicle following a routine traffic violation, but leaving open the question of what actions the officer could take toward the vehicle itself).

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neither cited nor mentioned it again, but rather, extensively relied on the Fourth Amendment to the United States Constitution and opinions of both this Court [*Texas* v. *Brown*, 103 S. Ct. 1535; *United States* v. *Place*, —— U.S. ——, 103 S. Ct. 2637 (1983); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *Katz* v. *United States*, 389 U.S. 347 (1967)] and the New York Court of Appeals [*People* v. *Miller*, 43 N.Y.2d 789, 402 N.Y.S.2d 392 (1977); *People* v. *Perel*, 34 N.Y.2d 462, 358 N.Y.S.2d 383 (1974); *People* v. *Sullivan*, 29 N.Y.2d 69, 323 N.Y.S.2d 945 (1971)] construing the Fourth Amendment, to reach its decision. *See Oregon* v. *Kennedy*, 456 U.S. 667 670-671 (1982) (this Court has jurisdiction to review a state court decision which relied on precedents from both this Court and the state court interpreting the federal constitution). Additionally, the lower court's concluding reference to section 401 subd. 4 of the New York Vehicle and Traffic Law, which concerns only the identification of vehicles and *not* their inspection, could not have constituted an adequate state ground for overturning the routine inspection of the vehicle, especially absent the "plain statement" to that effect, which this Court required in *Michigan* v. *Long*, 103 S. Ct. at 3476-3477. Clearly then, since the New York Court of Appeals based its decision entirely upon the Fourth Amendment, this Court has jurisdiction to review that decision.

This vacuum persists despite numerous pronouncements from this Court concerning the parameters of automobile searches in various other contexts [*e.g. Michigan* v. *Long*, —— U.S. ——, 103 S. Ct. 3469 (1983) (where the officer fears for his safety); *United States* v. *Ross*, —— U.S. ——, 102 S. Ct. 2157 (1982) (probable cause to believe the vehicle contains contraband); *New York* v. *Belton*, 453 U.S. 454 (1981) (incident to the driver's arrest); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (inventory of the vehicle's contents)], which presumably occur with less frequency than the routine traffic infraction and accompanying VIN inspection, the legality of which remains an unresolved question. Since police officers and the courts which review their actions must confront this issue on a daily basis, this Court's resolution of it is necessary both to clarify an important question of Fourth Amendment jurisprudence and, perhaps more importantly, to guide law enforcement officials in the performance of their duty.

The importance of this issue, not only to effective law enforcement in New York, but in each of the fifty states, cannot be understated. In *Delaware* v. *Prouse*, 440 U.S. at 658, this Court recognized that

> the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.

See United States v. *Martinez-Fuerte*, 428 U.S. 543, 560 n. 14 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 883 n. 8 (1975); *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973); *see also California* v. *Trombetta*, —— U.S. ——, 104

S. Ct. 2528 (1984). In order to protect that "vital interest" and preserve an equally vital interest in the detection of the 119,735[2] stolen cars which plagued New York last year alone (*see Delaware* v. *Prouse*, 440 U.S. at 659 n. 18) police officers, after stopping automobiles for traffic violations, must not only inspect the driver's license and registration (*Delaware* v. *Prouse, supra*, at 659), but must also compare the information contained therein with the VIN plate, located on either the doorpost, dashboard, or motor.

Only through such an inspection process can the registration be verified, and an on-the-spot determination be made as to whether the vehicle has been stolen. This process cannot be considered a search within the meaning of the Fourth Amendment because its purpose is not the recovery of evidence, but rather, the mere inspection of a public document located in the most public, accessible areas of the vehicle. Indeed, the VIN plate owes its very existence to just such a purpose, and if police officers are to be prevented from undertaking such minimal, administrative inspections of them, then states will not only lose the ability to regulate the safety of their roads, but will be prevented from utilizing a swift and sure method of detecting stolen cars as well.

Moreover, in comparison to the critical importance of these VIN inspections, the intrusion which they engender for motorists can only be described as "*de minimis*". *See Pennsylvania* v. *Mimms*, 434 U.S. at 111; *United States* v. *Robinson*, 414 U.S. at 234. The motorist lawfully stopped for a traffic infraction has already been seized within the

2. 1983 New York State Crime and Justice Annual Report, p. 10 (Division of Criminal Justice Services 1983).

meaning of the Fourth Amendment (*Delaware* v. *Prouse*, 440 U.S. at 658) and a police officer's quick, routine inspection of the stopped vehicle's VIN plate, located on either the door, which the officer has a right to open (*see Pennsylvania* v. *Mimms*, 434 U.S. at 110-111; *United States* v. *Robinson*, 414 U.S. at 234), the dashboard, plainly visible to someone peering inside the car [*see Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535, 1542 (1983)] or on the motor, underneath the front hood, barely constitutes an additional intrusion. Similarly, other common areas of an automobile vital to either the safety or identification of the vehicle, *e.g.*, tailpipe, chassis, etc., should also be subject to such a routine administrative inspection following a traffic violation, in order to determine both the vehicle's proper registration and its compliance with road and safety regulations. *See, generally Michigan* v. *Tyler*, 436 U.S. 499 (1978); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

Notwithstanding the circumscribed nature and purpose of these routine roadside inspections, the New York Court of Appeals interpreted the Fourth Amendment as categorically prohibiting them. That court proscribed any intrusion into a vehicle for purposes of VIN plate inspection, no matter how minimal or circumscribed that intrusion might be. By interpreting the Fourth Amendment in this restrictive manner, the New York Court of Appeals adopted the view of a minority of jurisdictions. Indeed, most of the federal circuits and high state courts which have addressed this important and recurring issue have held that the opening of a door or engine hood for purposes of a VIN inspection does not constitute a search within the

meaning of the Fourth Amendment and is permissible within the context of a routine traffic stop [*e.g. United States* v. *Squires*, 456 F.2d 967, 969-970 (2d Cir. 1972); *United States* v. *Johnson*, 431 F.2d 441 (5th Cir. 1970) (en banc); *United States* v. *Graham*, 391 F.2d 439 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968); *United States* v. *Zemke*, 457 F.2d 110 (7th Cir.), *cert. denied*, 406 U.S. 947 (1972); *United States* v. *Ware*, 457 F.2d 828 (7th Cir.), *cert. denied*, 409 U.S. 888 (1972); *United States* v. *Powless*, 546 F.2d 792, 795 (8th Cir.), *cert. denied*, 430 U.S. 910 (1977); *Cotton* v. *United States*, 371 F.2d 385, 393 (9th Cir. 1967); *People* v. *Wolf*, 60 Ill. 2d 230, 326 N.E.2d 766 (Sup. Ct. Ill.), *cert. denied*, 423 U.S. 946 (1975); *State* v. *Sedacca*, 252 Md. 207, 249 A.2d 456 (Ct. App. Md. 1969); *Commonwealth* v. *Hason*, 387 Mass. 2d 169, 439 N.E.2d 251 (Sup. Ct. Mass. 1982); *People* v. *Brooks*, 405 Mich. 225, 274 N.W.2d 430 (Sup. Ct. Mich. 1979); *Shirley* v. *Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (Sup. Ct. Va. 1977)], while only a minority have held such inspections, absent either probable cause to believe the vehicle stolen, or a valid search warrant, to be violative of the Fourth Amendment. *E.g. Simpson* v. *United States*, 346 F.2d 291 (10th Cir. 1965); *State* v. *Moore*, —— Ha. ——, 659 P.2d 70 (Sup. Ct. Ha. 1983); *State* v. *Simpson*, 95 Wash. 2d 170, 622 P.2d 1199, 1207-1211 (Sup. Ct. Wash. 1980); *cf. State* v. *McGann*, —— N.H. ——, 467 A.2d 571 (Sup. Ct. N.H. 1983) (VIN inspection as violative of the New Hampshire Constitution); *see* Annot., 27 A.L.R. 4th 549 (1984) (Search and seizure: suppression of evidence found in automobile during routine check of vehicle identification number).

Therefore, in view of this conflict among the various circuits and state courts, the unresolved nature of this issue

and its grave importance to both the law enforcement community and the millions of motorists who travel the highways and roads of this country each year, a writ of certiorari should issue to resolve this vexing problem.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1985

APPENDICES

APPENDIX A

Opinion

NEW YORK COURT OF APPEALS

No. 520

THE PEOPLE &c.,

Respondent.

v.

BENIGNO CLASS,

Appellant.

(520) Mark C. Cogan & William E. Hellerstein, N.Y. Legal Aid, for appellant.

Mario Merola, DA, Bronx County (Roger L. Stavis & Steven R. Kartagener of counsel) for respondent.

KAYE, J.

A police officer's nonconsensual entry into an individual's automobile to determine the vehicle identification number violates the federal and state constitutions where it is based solely on a stop for a traffic infraction (U.S. Const, 4th Amdt; N.Y. Const, art I, § 12).

On May 11, 1981, in the late afternoon, Police Officers Lawrence Meyer and William McNamee observed defendant driving 5 to 10 miles per hour above the speed limit, in a car with the windshield cracked on the passenger side. The

officers drove alongside defendant's car and instructed him to pull over. Defendant followed this directive, emerged from his car and approached Officer Meyer, the driver of the police car. He provided Meyer with his registration and proof of insurance but stated that he did not have a driver's license in his possession. Meanwhile, Officer McNamee had gone directly to defendant's car, opened the door and checked the left door jamb for the vehicle identification number (VIN). Since the VIN was not located on the door jamb, McNamee reached in and moved papers on the dashboard to enable him to view the VIN. In doing so, he saw a handle of a gun protruding from underneath the seat, seized it, and defendant was promptly arrested.

The hearing court denied defendant's motion to suppress the gun. Although the court concluded that the officers had "no reason to believe the vehicle . . . was stolen" when defendant was stopped, it found their action reasonable in light of defendant's "immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession." Defendant then pleaded guilty to criminal possession of a weapon in the third degree and was sentenced to five years' probation. On appeal to the Appellate Division, the four-Justice majority affirmed without opinion. The dissenting Justice found the search impermissible because "there was absolutely no predicate for believing the car was stolen."

VIN inspections typically involve opening a car door to locate the VIN on the doorpost, opening the hood to locate the VIN on the engine, or looking for the hidden VIN in obscure parts of an automobile. While this court has not previously considered the legality of such inspec-

tions conducted without consent, lower courts in this state, as well as courts in other jurisdictions, have approached the question from divergent perspectives. Initially, courts are divided on the threshold issue of whether a VIN inspection constitutes a search.[1] On the facts presented by this appeal, we conclude that a search was conducted.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy" (*United States* v. *Chadwick*, 433 U.S. 1, 7; see, also, *Katz* v. *United States*, 389 U.S. 347; *People* v. *Perel*, 34 N.Y.2d 462, 466). One has no legitimate expectation of privacy in locations in a car which are observable by passerby. Accordingly, an officer's simply peering inside an automobile does not constitute a search and the Fourth Amendment consequently does not limit this activity (*Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535; *People* v. *Cruz*, 34 N.Y.2d 362, 370). But there are many places inside a car—including the area underneath the seats—which cannot be viewed from the outside and which an individual legitimately expects will remain private. The government intrusion here, Officer McNamee's opening the door and reaching inside, was undertaken to obtain information and it exposed these hidden areas. It therefore constituted a search (cf. *United States* v. *Place*, —— U.S. ——,

1. Compare, for example, *United States* v. *Polk* (433 F.2d 644); *United States* v. *Johnson* (413 F.2d 1396, affd. en banc 431 F.2d 441); *Cotton* v. *United States* (371 F.2d 385); *People* v. *Valoppi* (61 Mich. App. 470, 233 N.W.2d 41); and *People* v. *Hart* (75 Misc. 2d 908), with *United States* v. *Powers* (439 F.2d 373, cert. den. 402 U.S. 1011); *Simpson* v. *United States* (346 F.2d 291); *State* v. *Moore* (—— Ha ——, 569 P.2d 70); *People* v. *Piper* (101 Ill. App. 3d 296, 427 N.E.2d 1361); and *State* v. *Simpson* (95 Wash.2d 170, 622 P.2d 1199). Though not treating a VIN inspection as a search, some courts have limited the officers' right to check the VIN "to those cases in which there is a legitimate reason to do so" (see, e.g., *Cotton* v. *United States*, 371 F.2d 385, 393, *supra*). The basis for imposing this limitation is not clear.

103 S. Ct. 2637; *People* v. *Miller*, 43 N.Y.2d 789, affg., 52 A.D.2d 425, 428; *People* v. *Sullivan*, 29 N.Y.2d 69).[2]

The absence of any legitimate expectation of privacy in the VIN itself is not determinative of the issue presented. The fact that certain information must be kept, or that it may be of a public nature, does not automatically sanction police intrusion into private space in order to obtain it. In particular, the existence of a VIN on every automobile cannot enable police, without any basis, to make "wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen." (1 W. LaFave, Search and Seizure, § 2.5, p. 360.)[3]

A VIN inspection normally involves a lesser invasion of privacy than a full-blown search because of the fixed, known and readily accessible location of the VIN on the automobile. Additionally, there is a compelling police interest, in situations such as automobile thefts and accidents, in the positive identification of vehicles. Consequently, it may well be that some lesser justification than probable cause would be appropriate. However, it is unnecessary in this case to determine whether probable cause or a lesser justification should have been required to support the search, because here there was no semblance of either. The trial court based its apparent finding of reasonable suspicion to believe the car was stolen on two factors: defendant's exiting the vehicle and approaching the officers and his failure

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2. Although the gun was "protruding" from underneath the seat, Officer McNamee first observed it while conducting the search. The only question, then, is whether the officer had a right to be in the position from which he made his observation.

3. We are not confronted with a governmental intrusion so circumscribed as to expose only information or articles in which there is no legitimate expectation of privacy (compare *United States* v. *Place*, 103 S. Ct. 2637, *supra*; *Smith* v. *Maryland*, 442 U.S. 735). Nor are we concerned here with an inventory of an impounded car.

to produce a driver's license. But a driver's emergence from a car upon being stopped by police is not indicative of criminal activity. Nor was reliance properly placed by the court on defendant's failure to produce a license because McNamee, having proceeded directly to defendant's car, was not even aware of that fact when he entered the automobile. Since competing inferences cannot reasonably be drawn from the undisputed facts presented, the hearing court erred as a matter of law in finding reasonable suspicion to believe the car was stolen (see *People* v. *Harrison,* 57 N.Y.2d 470, 477). The facts reveal no reason for the officer to suspect other criminal activity or to act to protect his own safety (compare *People* v. *David L.,* 56 N.Y.2d 698, cert. den., 459 U.S. 866). The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction, an offense which, standing alone, did not justify the search (cf. *People* v. *Marsh,* 20 N.Y.2d 98).

Some lower court cases in New York have interpreted subdivision 4 of section 401 of the Vehicle and Traffic Law as authorizing VIN inspections (see, e.g., *People* v. *Gohn,* 49 A.D.2d 585; *People* v. *Frank,* 61 Misc.2d 450; *People* v. *Goldstein,* 60 Misc.2d 745.) That section provides, in pertinent part:

> Carrying certificate of registration. Every person operating a motor vehicle or a motor vehicle and a trailer, registered or transferred in accordance with any of the provisions of this chapter, shall upon demand of any magistrate, motor vehicle inspector, peace officer, acting pursuant to his special duties, or police officer produce for inspection the certificate of registration or the registration renewal stub for such vehicle and shall furnish to such magistrate, inspector, officer or police officer any information necessary for the iden-

> tification of such vehicle and its owner, and all information required concerning his license to operate, if he is required by law to have such a license, and shall, if required, sign his name in the presence of such magistrate, inspector, peace officer or police officer as a further means of identification.

In section 401, however, the Legislature has seen fit only to authorize an officer to *demand* information necessary to identify the car, as he may *demand* the certificate of registration for the vehicle.[4] No basis has been shown for ignoring this legislative direction. Here, had the officer complied with the statute and demanded exhibition of the VIN, defendant could have avoided the intrusion on his privacy interests by simply moving the papers on the dashboard, thereby facilitating the officer's observation of the VIN through the windshield. Section 401, therefore, provided no justification for the officer's entry of defendant's car.

Accordingly, the order should be reversed, the motion to suppress granted, the conviction vacated and the indictment dismissed.

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4. No suggestion has been made that the police without basis could search the person of the driver or the interior of the vehicle to obtain a registration certificate, yet the statutory provision is no different for the VIN and the certificate of registration; in both instances the information must be provided on demand of a police officer.

JONES, J. (dissenting):

I would affirm the order of the Appellate Division which upheld Criminal Term's denial of defendant's motion to suppress the .22 calibre revolver. I do not differ with the majority's recital of the facts; I do depart, however, from the legal conclusion that it reaches.

It is undisputed that the police were warranted in stopping defendant's 1972 Dodge Charger. They had observed that it was travelling in excess of the speed limit and that it had a cracked windshield. In this circumstance they were justified not only in stopping the vehicle but thereafter in obtaining its vehicle identification number (VIN).

The requirement that each motor vehicle be assigned a VIN is for the purpose of facilitating rapid, positive identification of each particular motor vehicle. The VIN is functional only when affixed to the particular vehicle and comes into the owner's possession solely by reason of such affixation. The letters and digits constituting the VIN (as distinguished from the tab on which they may be imprinted) have no independent existence and are not susceptible of being possessed by the owner separate and apart from his possession of the vehicle or of being independently "seized" by the police.

The Supreme Court of the United States and our Court have recognized that the owner of a motor vehicle has only a diminished expectation of privacy with respect to the contents of an automobile that is being operated on the highway (*United States* v. *Chadwick*, 433 U.S. 1, 11-13; *People* v. *Belton*, 55 N.Y.2d 49, 53). With respect to a VIN affixed to a motor vehicle, however, once the vehicle is on the high-

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way the owner can have no expectation of privacy.[1] The purpose of the VIN is to proclaim the identity of the vehicle, a purpose quite inconsistent with any legitimate privacy interest of the owner.

The police on the other hand have a compelling interest, usually in the identification of a particular motor vehicle, but always in the ready availability of a near-infallible method of vehicular identification. Positive identification of a motor vehicle may be sought by them for a variety of regulatory and administrative objectives as, for example, to establish correlation with a registration certificate produced by the driver, to make positive identification of a vehicle involved in an accident, or to determine whether the vehicle has been stolen. Its identification may also be sought, of course, for purposes of recovery of a vehicle previously known to have been stolen, but in many instances when inspection of the VIN is made the police have no intimation of actual pre-existent criminal activity. Familiar concepts with respect to the necessity for probable cause to justify a search for or seizure of criminal evidence or contraband would be applicable to VIN inspection only if the objective of the police action was search for proof with respect to known or suspected pre-existing criminal activity. These concepts are immaterial and have no application where, as here, there is no evidence that such was the purpose of police inspection of the VIN, the objective of which was identification of the vehicle only, with no

1. A large number of cases have expressly held that there is no expectation of privacy in a VIN (e.g., *United States* v. *Powers*, 439 F.2d 373 [4th Cir.], cert. den., 402 U.S. 1101; *United States* v. *Polk*, 433 F.2d 644 [5th Cir.]; *United States* v. *Graham*, 391 F.2d 439 [6th Cir.], *cert. den.*, 393 U.S. 941; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.]; *State* v. *Colon*, 316 A.2d 797 [Conn. Cir.]; *Commonwealth* v. *Hason*, 439 N.E.2d 251 [Mass.]; *People* v. *Brooks*, 274 N.W.2d 430 [Mich.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.]; *People* v. *Valoppi*, 233 N.W.2d 41 [Mich. App.]; *Commonwealth* v. *Grabowski*, 452 A.2d 827 [Pa. Super.]).

thought of connection with known or suspected previous criminal activity. The purpose of the police was to obtain information, not to seize physical evidence.[2]

In sum, except possibly in exceptional circumstances, I would hold that whenever the police are justified in making a traffic stop (cf. *People* v. *Ingle*, 36 N.Y.2d 413) they are authorized to inspect the VIN.

After the concededly permissible traffic stop in this instance Officer McNamee opened the driver's door of the vehicle in expectation of finding the VIN on the inside panel of the door. Not finding it there he went directly to the

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2. Several courts have adopted the view that entry into a motor vehicle to find the VIN is not a search for purposes of the Fourth Amendment (e.g., *United States* v. *Forrest*, 620 F.2d 446 [5th Cir.]; *United States* v. *Duckett*, 583 F.2d 1309 [5th Cir.]; *United States* v. *Williams*, 434 F.2d 681 [5th Cir.]; *United States* v. *Polk*, 433 F.2d 644 [5th Cir.], *supra*; *United States* v. *Johnson*, 413 F.2d 1396, *affd. en banc*, 431 F.2d 441 [5th Cir.]; *United States* v. *Graham*, 391 F.2d 439 [6th Cir.], *cert. den.*, 393 U.S. 941, *supra*; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.], *supra*; *Cotton* v. *United States*, 371 F.2d 385 [9th Cir.]; *State* v. *Renfrow*, 597 P.2d 546 [Ariz.]; *State* v. *Cohn*, 284 So.2d 426 [Fla. App.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.], *supra*; *People* v. *Valoppi*, 233 N.W.2d 41 [Mich. App.], *supra*; *Fox* v. *Commonwealth*, 189 S.E.2d 367 [Va.]. Many courts have upheld the VIN inspection, even if it be termed a search, in circumstances amounting to less than probable cause (e.g., *United States* v. *Dadurian*, 450 F.2d 22 [1st Cir.], *cert. den.*, 405 U.S. 1044; *United States* v. *Powers*, 439 F.2d 373 [4th Cir.], *cert. den.*, 402 U.S. 1101, *supra*; *United States* v. *Duckett*, 583 F.2d 1309 [5th Cir.], *supra*; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.], *supra*; *United States* v. *Powless*, 546 F.2d 792 [8th Cir.]; *United States* v. *Brown*, 535 F.2d 424 [8th Cir.]; *Cotton* v. *United States*, 371 F.2d 385 [9th Cir.], *supra*; *State* v. *Renfrow*, 597 P.2d 546 [Ariz.], *supra*; *State* v. *Colon*, 316 A.2d 797 [Conn. Cir.], *supra*; *People* v. *Wolf*, 326 N.E.2d 766 [Ill.]; *People* v. *Brewer*, 317 N.E.2d 218 [Mich. App.], *supra*; *Wood* v. *State*, 632 S.W.2d 734 [Tex. App.]; *Fox* v. *Commonwealth*, 189 S.E.2d 367 [Va.], *supra*; cf. *United States* v. *Squires*, 456 F.2d 967, 970 [2d Cir.]). Research has disclosed only six reported cases in which police inspection of a VIN has been struck down (*United States* v. *Nikrasch*, 367 F.2d 740 [7th Cir.]; *Simpson* v. *United States*, 346 F.2d 291 [10th Cir.]; *State* v. *Moore*, 659 P.2d 70 [Haw.] *People* v. *Piper*, 427 N.E.2d 1361 [Ill. App.]; *State* v. *McGann*, 467 A.2d 571 [N.H.] *State* v. *Simpson*, 622 P.2d 1199 [Wash.]).

other location where to his knowledge the VIN would be found—on top of the dashboard on the driver's side. When he observed that view of the VIN in that location was obscured by some papers, he reached inside the vehicle and moved them aside to view the VIN. That he did not first request defendant to remove the papers or seek his consent to do so is immaterial; such consent could not permissibly have been withheld. The officer was not searching for or intending to seize any physical evidence on the ground that he had probable cause to believe that a crime had been committed; he was seeking information relevant and appropriate to the traffic stop which all concede he had been authorized to make.

The right of the police to inspect the VIN affixed to a motor vehicle is to be distinguished from the right of the police to search for or to seize a vehicular registration certificate. Registration of a motor vehicle, with the related license plates, in contrast to a VIN, serves to describe a vehicle and identify its owner and constitutes proof that the vehicle has been properly licensed for operation on the highway for a specified period of time, customarily one year. In the course of its life a motor vehicle may be, and customarily is, the subject of several different registration certificates, reflecting different periods of licensing and usually successive ownership. A registration certificate may be independently possessed by its owner, on his person, in the glove compartment of the vehicle, or otherwise. Without probable cause the police would have no right to search the person of the driver or the interior of the vehicle to obtain a registration certificate. Penalties might attach to the failure of the driver to produce the registration certificate, but that fact would not enlarge the right of the

police to search. The VIN, however, is intended to be indelibly affixed to the particular vehicle throughout its existence, irrespective of changing ownership of the vehicle and whether or not it is licensed for operation on the highway. As its name states, its purpose is vehicle registration without reference to ownership or licensure for operations.[3]

Inasmuch as in this instance the police had the right to inspect the VIN of the 1972 Dodge[4] and the revolver was observed inadvertently and without intention to search for it, under the plain view doctrine it should not be suppressed (see *Texas* v. *Brown*, —— U.S.——, 103 S. Ct. 1535).

* * * * * * * * * * * * * *

Order reversed, motion to suppress granted, conviction vacated and indictment dismissed. Opinion by Judge Kaye in which Chief Judge Cooke and Judges Wachtler, Meyer and Simons concur. Judge Jones dissents and votes to affirm in an opinion in which Judge Jasen concurs.

Decided November 27, 1984

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3. The right to inspect the VIN would not, of course, justify a rummaging search of a motor vehicle. The officer would be warranted only in going directly, as he did in this case, to a location where by the officer's advance knowledge the VIN was to be found. By like token, a pretext search would not be condoned.

4. I would reach this result without reference to the provisions of Vehicle and Traffic Law, § 401(4).

APPENDIX B

10 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BENIGNO CLASS, Appellant.—Judgment, Supreme Court, Bronx County (Murray Koenig, J.), rendered on December 10, 1981, affirmed. Concur—Asch, Silverman, Bloom and Kassal, JJ.

Carro, J. P., dissents in a memorandum as follows: Defendant was stopped for driving 5 to 10 miles above the speed limit and because the windshield on the passenger side was badly cracked. When the officers (who were not in uniform and drove an unmarked patrol car) pulled up next to him, flashed a badge and ordered him to pull over, he did so. Mr. Class got out of the car and walked back to the officers, who had also alighted. One officer asked him for his license and registration, while the other officer went over to the car. Defendant produced an insurance card and the registration, but had no license to show. As defendant and the first officer discussed this, the second officer opened the car door on the driver's side, allegedly to check the Vehicle Identification Number (VIN). There was no VIN on the car door, so the officer (testified that he) checked the dashboard, but it was obstructed by "something", which he pushed away. As he did that he saw what appeared to be the "handle of a gun sticking out from the driver's seat underneath." A .22 calibre pistol was recovered, Mr. Class was arrested and in the ensuing search of defendant, ammunition was recovered. Summonses were also issued for unlicensed operation of a motor vehicle and driving with a broken windshield. The above recitation of the facts is a distillation of the two officers' testimony, which the suppression court accepted. The officers also testified that

they had no basis for believing the car to be stolen, the registration papers later checked out as valid (no radio run was made on the car at any time) and the VIN was never even copied down by the officer who allegedly searched for it. The court below denied defendant's suppression motion by ruling that the gun had been "in plain view" when seized. The court found the initial search for the VIN to be justified, "notwithstanding any lack of probable cause to believe the car had been stolen," because "the defendant's conduct, that is, immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession, made these officer's actions quite reasonable and prudent under the circumstances." Such reasoning bends both logic and the law, the latter in violation of the constitutional prohibition against unreasonable searches and seizures. (U.S. Const., 4th Amdt.) This incident occurred about 4:30 in the afternoon, on a sunny day, right before the onset of rush hour. There was not the slightest hint in the officer's testimony that this was a high crime area or that they were on any more than "routine patrol." The conclusion that defendant's act, of getting out of his car and going to the officers rather than awaiting their approach, constituted suspicious behavior, is absurd. I would do the same thing myself, if for no other reason than the recent tragedies of officers being fired upon as they approach stopped drivers might reasonably create an apprehension that would be dispelled by my exhibiting myself as clearly unarmed. The court's second point is even more illogical since, by the officer's own testimony, the search of the car by one officer began before the other had yet discovered that defendant was not

a licensed driver. Since the search was conducted without any indication of impropriety or preliminary radio run on the license plate, the police action was no more than a wrongful trespass, and the plain view doctrine is inapplicable. (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466, 472.) As the Court of Appeals stated many years ago, "[t]here is no question, and the entire court agrees, that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction." (*People* v. *Marsh*, 20 N.Y.2d 98, 100 [per Fuld, Ch. J.], as affd. in *People* v. *Howell*, 49 N.Y.2d 778, 779.) And while the alleged premise here—to search for the VIN—was less intrusive than a full-blown inventory, it still constituted an impermissible search since there was absolutely no predicate for believing the car was stolen. (*Cotton* v. *United States*, 371 F.2d 385, 393-394; *People* v. *Gohn*, 49 A.D.2d 585.) Nor was there any lawful arrest to which the search was incident. (*People* v. *Erwin*, 42 N.Y.2d 1064, 1065.) Since the officer had no right to be in the car, his observation of the gun handle may not be sanctioned by the plain view doctrine. (*Coolidge* v. *New Hampshire*, *supra*; *People* v. *Gohn*, *supra*.)

EDITOR'S NOTE

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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1984 TERM

No. 84-1181

NEW YORK,

Petitioner,

-against-

BENIGNO CLASS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the New York Court of Appeals which, by the court's express statement, was predicated on the State Constitution as well as the Federal Constitution, and which cited a long line of the court's prior search and seizure rulings, was based on adequate and independent state grounds, and this Court therefore lacks jurisdiction.

2. Whether this Court should deny the petition because, under the extreme facts of this case, the New York Court of Appeals correctly held that a police officer is not entitled, after stopping a motorist for a routine traffic infraction, to open up the car to inspect the vehicle identification number where the officer does not suspect, and lacks any reason to believe, that the car is stolen.

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THIS COURT SHOULD DENY THE PETITION BECAUSE, UNDER THE EXTREME FACTS OF THIS CASE, THE NEW YORK COURT OF APPEALS CORRECTLY HELD THAT A POLICE OFFICER IS NOT ENTITLED, AFTER STOPPING A MOTORIST FOR A ROUTINE TRAFFIC INFRACTION, TO OPEN UP THE CAR TO INSPECT THE VEHICLE IDENTIFICATION NUMBER WHERE THE OFFICER DOES NOT SUSPECT, AND LACKS ANY REASON TO BELIEVE, THAT THE CAR IS STOLEN..... 6

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BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

Respondent requests that this Court deny the petition for a writ of certiorari to review the judgment the New York Court of Appeals entered in the instant case on November 27, 1984. **People v. Class**, 63 N.Y.2d 491, ___ N.E.2d ___ (1984).

JURISDICTION

Petitioner asserts this Court has jurisdiction under 28 U.S.C. §1257(3). Respondent maintains that this Court lacks jurisdiction because the decision of the New York Court of Appeals was based on adequate and independent state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

The New York Constitution, Article I, Section 12, provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Amendment IV, provides:

> The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent accepts the factual statement set forth in the Petition.

REASONS FOR DENYING THE WRIT

POINT I

THE DECISION OF THE NEW YORK COURT OF APPEALS WHICH, BY THE COURT'S EXPRESS STATEMENT, WAS PREDICATED ON THE STATE CONSTITUTION AS WELL AS THE FEDERAL CONSTITUTION, AND WHICH CITED A LONG LINE OF THE COURT'S PRIOR SEARCH AND SEIZURE RULINGS, WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, AND THIS COURT THEREFORE LACKS JURISDICTION.

The New York Court of Appeals held that Police Officer McNamee violated Respondent's right to be free from unreasonable searches and seizures when, lacking any reason to believe the vehicle was stolen, he opened Respondent's car and disturbed some papers on the dashboard in an effort to examine the vehicle identification number [VIN] (See Petition, at 1a-6a). The decision was founded expressly on Article I, Section 12, of the New York Constitution, as well as the Fourth Amendment to the United States Constitution. In addition to explicit reliance upon the State Constitution, the court made it clear that its decision flowed from its own prior rulings in a host of cases: **People v. David L.**, 56 N.Y.2d 698, 436 N.E.2d 1324, **cert. denied**, 459 U.S. 866 (1982); **People v. Miller**, 43 N.Y.2d 789, 373 N.E.2d 286 (1977), **aff'g**, 52 A.D.2d 425 (1st Dept. 1976); **People v. Perel**, 34 N.Y.2d 462, 315 N.E.2d 452 (1974); **People v. Cruz**, 34 N.Y.2d 362, 314 N.E.2d 39

(1974); **People v. Sullivan**, 29 N.Y.2d 69, 272 N.E.2d 464 (1971), and **People v. Marsh**, 20 N.Y.2d 98, 228 N.E.2d 783 (1967). Under this Court's precedents, the decision of the New York Court of Appeals rested on an adequate, independent state ground precluding review by this Court.

In **Herb v. Pitcairn**, 324 U.S. 113, 125-126 (1945), this Court wrote that limitations on its jurisdiction and the rule against advisory opinions bar it from reviewing judgments of state courts that rest on adequate and independent state grounds. In order "scrupulously to observe the long standing rule [against reviewing] a judgment of a state court that rests on an adequate and independent ground in state law," the Court held it could not decide the case unless the state court indicated that its decision was mandated by federal law. **Id.** at 128.

In **Michigan v. Long**, ___ U.S. ___, 77 L.Ed.2d 1201, 1216 (1983), this Court held that a state court decision which "relied **exclusively** on [federal caselaw]" in support of the result was not based on adequate and independent state grounds (emphasis in original). Indeed, an inspection of the decision of the Michigan Supreme Court in **People v. Long**, 413 Mich. 461, 320 N.W.2d 866 (1982), reveals that the result turned entirely on the state court's analysis of this Court's holding in **Terry v. Ohio**, 392 U.S. 1 (1968).

The New York Court of Appeals, which has a long tradition of interpreting the State Constitution in favor of the public's right to be free from unreasonable searches and seizures,[1] relied on numerous decisions of its own in support of its holding that a police officer may not, absent any reason to suspect that a car is stolen, open up the door and disturb papers on the dashboard in an effort to inspect the vehicle identification number. Therefore, on its face, the decision of the New York Court of Appeals was based on adequate and independent state grounds.

Examination of the cases cited by the Court of Appeals confirms that its decision in the instant case was based on adequate and independent state grounds. The court's prior decisions in **People v. David L**, supra, 56 N.Y.2d 698, **People v. Miller**, supra, 43 N.Y.2d 789, **People v. Perel**, supra, 34 N.Y.2d 462, and **People v. Cruz**, supra, 34 N.Y.2d 362, were all based on

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1. In **People v. Elwell**, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477 (1980), the New York Court of Appeals held that the New York Constitution goes beyond this Court's holdings in **Spinelli v. United States**, 393 U.S. 410 (1969), and **Draper v. United States**, 358 U.S. 307 (1959), as to the corroboration required in order to sustain a warrantless search or arrest based on an informant's tip. Likewise, in **People v. Belton**, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982), the Court of Appeals interpreted the New York Constitution in a manner differently than this Court had interpreted the Fourth Amendment in the area of vehicle searches. For other decisions holding that the New York Constitution provides broader protection against unreasonable searches and seizures, **See People v. Gokey**, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724 (1983) and **People v. Smith**, 59 N.Y.2d 454, 457-459, 452 N.E.2d 1224, 1227 (1983).

New York law. The court's reliance on New York law in **People v. Marsh, supra**, 20 N.Y.2d 98, cannot be doubted. In that case, the Court of Appeals held that relevant New York statutes failed to authorize the police to conduct a search whenever they stop a motorist for a traffic infraction. **Id.** at 100-101. The court also held that the New York and United States Constitutions mandated the same rule. **Id.** at 102. In the instant case, the Court of Appeals cited **People v. Marsh** to support its holding that a police officer, upon stopping a motorist for a routine traffic infraction, is not entitled to open up a car or disturb papers on the dashboard in an effort to inspect the vehicle identification number, where the officer lacks any reason to believe that the car is stolen (see Petition, at 5a). It is noteworthy that even the dissenters in this case acknowledge that the New York Court of Appeals has carved out its own "expectation of privacy" jurisprudence alongside that articulated by this Court (see Petition, at 7a).

The mere fact that Article I, Section 12, of the New York Constitution contains the same language as the Fourth Amendment in no way prevents the New York provision from being interpreted to provide greater protection to the public's right to be free from unreasonable searches and seizures than would the Federal Constitution. **Sibron v. New York**, 392 U.S. 40, 60-61

(1968); **People v. Belton, supra**, 55 N.Y.2d at 51, 432 N.E.2d at 746.

In a case where, as here, the decision sought to be reviewed rests on both state and federal grounds, either of which would have been dispositive, this Court lacks jurisdiction. **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562, 568 (1977). The Petition should therefore be denied.

POINT II

THIS COURT SHOULD DENY THE PETITION BECAUSE, UNDER THE EXTREME FACTS OF THIS CASE, THE NEW YORK COURT OF APPEALS CORRECTLY HELD THAT A POLICE OFFICER IS NOT ENTITLED, AFTER STOPPING A MOTORIST FOR A ROUTINE TRAFFIC INFRACTION, TO OPEN UP THE CAR TO INSPECT THE VEHICLE IDENTIFICATION NUMBER WHERE THE OFFICER DOES NOT SUSPECT, AND LACKS ANY REASON TO BELIEVE, THAT THE CAR IS STOLEN.

A police officer is not entitled to conduct a search whenever he stops a motorist for a routine traffic infraction. In order to conduct a warrantless, search, rather, the police must have reasonable grounds, apart from the traffic violation itself, to believe that the motorist is guilty of a crime. **Dyke v. Taylor Implement Co.**, 391 U.S. 216, 221 (1968).

The officer who entered Respondent's car to examine the vehicle identification number was so patently lacking in legal justification that his conduct amounted to an egregious violation of Respondent's right to be free from unreasonable searches and seizures. Unlike the situation in nearly every other reported case

involving the legality of VIN inspections, Officer McNamee's conduct was not supported by the slightest suggestion that Respondent's car was stolen.

No court, in any American jurisdiction, has ever expressly held that a police officer has the right, upon stopping a motorist for a routine traffic infraction, to open up the car in order to inspect the vehicle identification number where the officer does not suspect, and lacks any reason to believe, that the car is stolen. Where, as in the instant case, a police officer, lacking any reason to believe the car is stolen, opens up the car in order to inspect its vehicle identification number, the officer violates the motorist's right to be free from unreasonable searches and seizures. **See State v. Moore**, 659 P.2d 70 (Hawaii 1983); **People v. Piper**, 101 Ill.App.3d 296, 427 N.E.2d 1361 (1981); **State v. Simpson**, 95 Wash.2d 170, 622 P.2d 1199 (1980). Vehicle identification number inspections have also been held unlawful in **United States v. Nikrash**, 367 F.2d 740, 743 (7th Cir. 1966); **Simpson v. United States**, 346 F.2d 291, 294 (10th Cir. 1965); and **State v. McGann**, 467 A.2d 571 (N.H. 1983). The only case that in any way supports the position urged by Petitioner is **State v. Sedacca**, 252 Md. 207, 249 A.2d 456, 457 (1969), but that decision did not closely analyze the precise issue presented by the instant case.

The cases relied on by Petitioner (Petition, at 9) provide no support for the proposition that a police officer, lacking any reason to believe a car is stolen, is entitled to open it in order to view its vehicle identification number. Every case Petitioner cites involves a situation where the circumstances give rise to a reasonable belief that the vehicle was stolen: **United States v. Powless**, 546 F.2d 792 (8th Cir.), **cert. denied**, 430 U.S. 910 (1977); **United States v. Ware**, 457 F.2d 828, **cert. denied**, 409 U.S. 888 (1972); **United States v. Zemke**, 457 F.2d 110 (7th Cir.), **cert. denied**, 406 U.S. 947 (1972); **United States v. Squires**, 456 F.2d 967 (2d Cir. 1972); **United States v. Johnson**, 431 F.2d 441 (5th Cir. 1970); **United States v. Graham**, 391 F.2d 439 (6th Cir.), **cert. denied**, 393 U.S. 941 (1968); **Cotton v. United States**, 371 F.2d 385 (9th Cir. 1967); **People v. Wolf**, 60 Ill.2d 230, 326 N.E.2d 766, **cert. denied**, 423 U.S. 946 (1975); **Commonwealth v. Mason**, 387 Mass. 169, 439 N.E.2d 251 (1982); **People v. Brooks**, 405 Mich. 225, 274 N.W.2d 430 (1979); and **Shirley v. Commonwealth**, 218 Va. 49, 235 S.E.2d 432 (1977).

Because the record in the instant case is devoid of any suggestion that Respondent's car was stolen, this case is unrepresentative of the VIN cases that have arisen elsewhere. The instant case would, therefore, be a poor vehicle for this Court to address the broad issues Petitioner seeks to raise herein (see

Petition, at 5-6).

Petitioner states that many cars are stolen in New York (Petition, at 7). Requiring a police officer to have a basis for suspecting that a particular car is stolen before he can open it up and inspect its vehicle identification number, however, in no way increases the risk that large numbers of stolen vehicles will evade detection. In a situation where, unlike the instant case, a police officer has reason to believe a vehicle is stolen, the decision of the New York Court of Appeals creates no barrier to examination of its vehicle identification number.

A decision that a police officer has the right, lacking any basis to believe that a car is stolen, to open a car to inspect its vehicle identification number, would seriously undermine the public's right to be free from unreasonable searches and seizures. The decision of the New York Court of Appeals should not be disturbed.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Attorney for Respondent

MARK C. COGAN
Of Counsel
February, 1985

PROOF OF SERVICE -- CERTIFICATE
BY A BAR MEMBER

I, WILLIAM E. HELLERSTEIN, the attorney for Benigno Class, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of February, 1985, I served the foregoing Brief in Opposition on the opposing party thereto, as follows:

On Counsel for Petitioner, by mailing a copy in a duly addressed envelope, with postage prepaid, to Mario Merola, District Attorney, 215 East 161st Street, Bronx, New York 10451.

WILLIAM E. HELLERSTEIN
Attorney for Respondent
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420

Office-Supreme Court, U.S.
FILED
MAY 2 1985
ALEXANDER L. STEVAS,
CLERK

BEST AVAILABLE COPY

No. 84-1181

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

BENIGNO CLASS,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

JOINT APPENDIX

MARIO MEROLA
District Attorney, Bronx County

STEVEN R. KARTAGENER
ROGER L. STAVIS
Assistant District Attorneys
215 East 161st Street
Bronx, New York 10451
(212) 590-2060

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Counsel for Respondent

Petition for Certiorari Filed January 18, 1985
Certiorari Granted April 1, 1985

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Chronological List of Relevant Docket Entries

No. 84-1181

The People of the State of New York against Benigno Class

Date	*Docket Entries*
May 21, 1981	Indictment is filed charging Benigno Class with Criminal Possession of a Weapon in the Third Degree.
June 8, 1981	Defendant is arraigned on the indictment and pleads not guilty.
June 11, 1981	Defendant files a pre-trial motion to suppress the weapon recovered from his automobile.
June 18, 1981	The People file their affirmation in opposition to defendant's pre-trial suppression motion.
July 10, 1981	An evidentiary hearing is held before Justice William Holland to determine defendant's suppression motion. Police Officers Lawrence Meyer and William McNamee testify for the People and defendant testifies on his own behalf.
October 13, 1981	Defendant's motion to suppress the weapon recovered from his automobile is denied.

Chronological List of Relevant Docket Entries

Date	*Docket Entries*
November 4, 1981	Defendant pleads guilty to the charge of Criminal Possession of a Weapon in the Third Degree as contained in the indictment.
December 10, 1981	Defendant is sentenced to a period of probation not to exceed five years.
January 8, 1982	Defendant files a notice of appeal from his judgment of conviction.
February 11, 1982	Defendant is granted leave to appeal as an indigent and William E. Hellerstein is appointed to represent him.
October 21, 1983	Defendant's appeal is argued before a panel of the New York Supreme Court, Appellate Division, First Department. At the argument, Mark C. Cogan represents defendant and Roger L. Stavis represents the People.
November 29, 1983	The New York Supreme Court, Appellate Division, First Department affirms defendant's judgment of conviction. Justice John Carro dissents from the Court's decision.
December 19, 1983	Justice John Carro grants defendant leave to appeal to the New York Court of Appeals.
January 10, 1984	Defendant is granted leave to appeal to the New York Court of Appeals as an indigent and William E. Hellerstein is assigned to represent him.

Chronological List of Relevant Docket Entries

Date	*Docket Entries*
October 12, 1984	Defendant's appeal is argued before the New York Court of Appeals. At the argument, Mark C. Cogan represents defendant and Roger L. Stavis represents the People.
November 27, 1984	The New York Court of Appeals reverses the order of the New York Supreme Court, Appellate Division and orders the suppression of the weapon and the dismissal of the indictment. Judges Matthew J. Jasen and Hugh R. Jones dissent from the court's decision.

Indictment, Filed May 21, 1981

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS—VFO

Defendant.

1X012126

Counts

CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE
265.02

DATE VOTED: 5-15-81

DATE FILED: 5-21-81

A TRUE BILL

/S/ B. KELLER
Foreman

MARIO MEROLA
District Attorney

Indictment, Filed May 21, 1981

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX, BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE COMMITTED AS FOLLOWS:

THE DEFENDANT ON OR ABOUT MAY 11, 1981, IN THE COUNTY OF THE BRONX, KNOWINGLY AND UNLAWFULLY POSSESSED A LOADED FIREARM, TO WIT: A LOADED PISTOL, SUCH POSSESSION NOT BEING IN THE DEFENDANT'S HOME OR PLACE OF BUSINESS.

THE SUBJECT MATTER OF THIS COUNT BEING AN ARMED FELONY AS THAT TERM IS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW.

MARIO MEROLA
District Attorney

Notice of Motion to Suppress Evidence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX

Indictment No. 1552/81

PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

SIRS AND MADAMS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of JUAN A. CAMPOS, attorney for the defendant herein, the undersigned will move the Supreme Court, Bronx County, Part 80, on the 19th day of June, 1981 at 9:30 in the forenoon, or as soon thereafter as counsel can be heard for an order

Suppressing any physical evidence taken from BENIGNO CLASS in violation of his Constitutional rights, or in the alternative for a hearing at which the issues of this Motion to suppress may be litigated; and

For such other and further relief as to the Court seems just and proper.

Dated: New York, New York
June 11, 1981

Yours, etc.

JUAN A. CAMPOS
Campos & Wojszwilo
170 Broadway
New York, N.Y. 10038
(212) 766-1386

To: MARIO MEROLA
District Attorney
Bronx County

Chief Clerk of Supreme Court
Bronx County

Affirmation of Juan A. Campos

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX

Indictment No. 1552/81

PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

JUAN A. CAMPOS, does hereby affirm to be true under penalty of perjury the following allegations:

1. I am the attorney for the defendant BENIGNO CLASS in the above-captioned matter, and as such, am fully familiar with the facts and circumstances herein.

2. This affirmation is made in support of defendant's motion to suppress the physical evidence that is the subject of the charge contained in aforesaid indictment.

3. This affirmation is based upon information and belief, the sources being inspection of official court papers and various police forms provided by the prosecution, and conversations with the defendant.

4. On May 11, 1981 BENIGNO CLASS was stopped while driving an automobile for violations of the Vehicle and Traffic Law.

Affirmation of Juan A. Campos

5. As Mr. Class stood by the police car in conversation with one of the police officers, the second officer approached his car, opened the car door and after looking inside took out a handgun.

6. The weapon was not visible from outside the vehicle being recovered only after a search of the car was conducted by [the] officer.

7. Mr. Class did not consent to the search of the vehicle nor were the officers in possession of a search warrant. Prior to the search of the car, Mr. Class would have merely been issued summons[es] for violation[s] of [the] Vehicle and Traffic Law. The vehicle would have been released to his family pursuant to standard police procedures.

8. In fact, later that same day, defendant's family was notified and the vehicle was released to a member of his family.

9. Under the circumstances the search of the car was unreasonable and violative of defendant's Constitutional rights.

WHEREFORE, deponent respectfully requests that this Court issue an order directing that the property seized be suppressed as evidence against BENIGNO CLASS in any criminal proceeding, or that this Court order a hearing and for such other and further relief which the Court deems just and proper.

Dated: New York, New York
June 11, 1981

/s/ JUAN A. CAMPOS

JUAN A. CAMPOS

(Affidavit of Service Omitted in Printing)

People's Affirmation in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

JANE KOCH GELLMAN, under penalty of perjury and pursuant to Rule 2106 of the C.P.L.R., hereby affirms and states:

I am an Assistant District Attorney in the Office of Mario Merola, District Attorney of Bronx County, and am submitting this affirmation in response to defendant's motion.

Defendant seeks a *Mapp* hearing and suppression of the weapon seized. As defendant was the driver of the car, it would appear that he has legal standing to make this request. The People oppose defendant's motion and deny the factual allegations made in support thereof. We do, however, consent to a pre-trial hearing regarding the same.

WHEREFORE, defendant's motion should be denied except as indicated above.

Dated: June 18, 1981
Bronx County

/s/ JANE KOCH GELLMAN

JANE KOCH GELLMAN
Assistant District Attorney

(Affidavit of Service Omitted in Printing)

Transcript of Proceedings

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: PART 82

MOTION TO SUPPRESS

Indictment No. 1552-81

PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

(Criminal Possession of Weapon in the 3rd Degree)

July 10, 1981
851 Grand Concourse
Bronx, New York 10451

Before:

HON. WILLIAM HOLLAND,
Justice.

Appearances:

FOR THE PEOPLE:
MARIO MEROLA, Esq.,
Bronx County District Attorney
By: MICHAEL HELFER, Esq.,
Assistant District Attorney

FOR DEFENDANT:
JUAN CAMPOS, Esq.

JUDITH JENSEN
Senior Court Reporter

Testimony of Police Officer Lawrence Meyer

* * *

[2] POLICE OFFICER LAWRENCE MEYER, Shield Number 31534, 43rd Precinct Anti-Crime, New York City Police Department, having been called as a witness for the People, was duly sworn, and testified as follows:

Court Officer: Police Officer Lawrence Meyer, M-E-Y-E-R, Shield 31534, assigned to the 43rd Precinct Anti-Crime.

The Court: All right, you may proceed.

Direct examination by Mr. Helfer:

Q. Officer Meyer, I direct your attention to May 11th, [3] this year. Were you working on that day?

A. Yes, I was.

Q. And, do you remember your tour of duty?

A. I was doing a ten to six.

Q. Now, at approximately four-thirty in the afternoon, did you have occasion to make an arrest?

A. Yes, I did.

Q. What was the location of that arrest?

A. The arrest was made at Bronx River Avenue and Westchester Avenue.

* * *

Testimony of Police Officer Lawrence Meyer

* * *

Q. What was the name of the individual you placed under arrest?

A. Mr. Benito [sic] Class.

Q. Can you tell the Court and Counsel the circumstances surrounding the arrest of Mr. Class?

A. We were on routine patrol and we were traveling south [4] bound on Bronx River Avenue; when we reached the intersection of Watson Avenue, we observed the Defendant's vehicle traveling northbound on Bronx River Avenue in our direction. It appeared that the car was moving at a high rate of speed. We also noticed at that point that the windshield on the vehicle was also broken. We made a U-turn and followed the vehicle to Westchester Avenue and Bronx River Avenue. At that time, we approached the Defendant's vehicle, and on the driver's side, displayed—my partner displayed his shield. We told him to pull the car over to the corner. He did. We put our car directly behind his. At that point, Mr. Class got out of the vehicle, walked back to the radio car and entered in a conversation with myself.

Q. Were you seated at that point or were you out of the car?

A. Excuse me?

Q. Were you seated at that point or were you out of the car?

A. I was standing in front of the unmarked radio car.

Q. Where was your partner?

A. He exited the passenger side and walked over to the Defendant's vehicle.

Q. Continue.

A. At that point, I asked Mr. Class for a license and registration. [5] He presented me with a registration and an insurance identification car. [sic] I asked him again for his license. He said he had none. At that point, I observed Officer McNamee open the vehicle door, reach in and

he seemed to pick up something off the floor. He did so. He showed it to me. It was a pistol. He put it down, I believe, in his jacket pocket and walked back to me. At that time, I told the Defendant he was under arrest, and Officer McNamee then unloaded the gun, handed it to me with six bullets.

Q. Okay. I have no further questions of this witness, Judge.

* * *

The Court: Was the Defendant the only person in that vehicle?

The Witness: Yes, he was.

The Court: Nobody else?

The Witness: No.

Cross-examination by Mr. Campos:

Q. Officer Meyer, what was the time that you first observed the Defendant's automobile, what make and model was that car?

A. It's a '72 Plymouth. Blue.

[6] Q. Two door or four door?

A. Two door.

Q. The time that you first observed the Defendant's car, you stated you were going southbound on Watson, and Westchester Avenue.

A. Southbound on Bronx River Avenue.

Q. And, the Defendant was going northbound?

A. Correct.

Q. You said the Defendant—what drew the attention to the Defendant's car was that you noticed that he was going at a high rate of speed, is that correct?

A. Yes.

Q. Approximately, in your opinion, how fast was he going?

A. Approximately thirty-five, forty miles an hour.

Testimony of Police Officer Lawrence Meyer

Q. Were there other vehicles—movement of vehicle traffic there heavy?

A. At that time, I believe so.

Q. Did Defendant stop for any lights?

A. Yes, he did.

Q. How many lights?

A. One.

Q. At what corner?

A. The traffic light is on Westchester Avenue, and that's [7] the only light.

Q. Was this before or after you had stopped the Defendant?

A. He was already stopped when we pulled up next to him.

Q. The time you were on duty, were you in an unmarked police car, is that correct?

A. Yes.

Q. Were you in plain clothes or uniform?

A. Yes.

The Court: Plain clothes?
The Witness: Plain clothes.

Q. Were you the driver or the recorder of that car?

A. I was the driver.

Q. When you noticed the Defendant's car, did you immediately make a U-turn or go to another light to take another street in order to follow the Defendant?

A. No, we immediately made a U-turn.

Q. How far away were you from the Defendant when you began following the Defendant's car on—going northbound on Bronx River and Westchester?

A. When he passed us, we immediately made a U-turn and he had stopped at the light behind the traffic, and we pulled up right behind him, right next to him, I should say.

Testimony of Police Officer Lawrence Meyer

Q. When you pulled up beside his car or behind his [8] car . . .

A. Right, beside it.

Q. . . . and your partner identified himself as a police officer . . .

A. Yes.

Q. . . . and, did—the Defendant then pulled over to the side of the street, is that correct?

A. Yes, he did.

Q. Who got—exited the car first? Were you and your partner exiting the car first or [did] the Defendant exit his car?

A. As soon as the vehicle stopped, the Defendant immediately got out of the car and began walking back to us, as we were exiting our vehicle.

Q. Officer, you stated that Mr. Class gave you his registration and an insurance identification and did you make a check of those documents?

A. He gave me a registration and an insurance card, yes.

Q. Did you make—did you check those documents out to see if they matched?

A. Later, yes, in the station house.

Q. At that time, you were engaged in conversation with my client, you testified that your brother officer, Police Officer McNamee went to the driver's side of the car, is that [9] correct?

A. Yes, he did.

Q. Did he check the car out first or did he immediately open the door and go inside?

A. Well, as I testified, I was in conversation with the Defendant, and I knew that Officer McNamee had opened the front door of the car, and I believe he called to me. I looked at him and he showed me a pistol. He stuck it in his pocket, and I told Mr. Benigno [Class] that he was under arrest.

Q. There came a time after that you made an arrest that you examined the car, is that correct?

A. Excuse me?

Testimony of Police Officer Lawrence Meyer

Q. Did you get a good look at the car?

A. Afterwards.

Q. Yes.

A. Correct.

Q. And, this—the windshield, the cracked windshield where was it, was it on the passenger side or the driver's side?

A. I believe it was the passenger side.

Q. Was it a small crack or large crack?

A. It was a point of impact and then the windshield had shattered out from that.

Q. Is it normal police procedure for stopping motorists [10] who have cracked windshields?

A. Yes.

Q. Do you recall the weather conditions there at that time, four-thirty on May 11th?

A. I believe, I don't recall. No. I don't recall.

Q. You don't recall whether it was [a] sunny day? Was it a rainy day?

A. I believe it had rained earlier in the day and it was sunny at that point. I don't really recall.

Q. Do you recall if the Defendant had his windshield—when you first observed the Defendant's car, did he have the wipers on the windshield—windshield wipers on?

A. No.

Q. Officer, when your partner, Police Officer McNamee, retrieved the gun, did he inform you as to where he retrieved the gun, from what area of the car?

A. Not at that time.

Q. Do you know for a fact where that gun was recovered from?

A. Now, I do.

Q. Is this as a result of conversation with your brother officer and the Assistant District Attorney?

A. Yes.

Testimony of Police Officer Lawrence Meyer

Q. Where was the location at that time?

[11] A. It was recovered from under the front seat.

Q. Did your brother officer inform you how he happened to retrieve the gun?

A. He told me he looked down and saw the handle protruding from the seat.

Q. Did he tell you what part of the handle?

A. The handle.

Q. Just the handle?

A. (Witness nodded.)

Q. There came a time after you [had] placed this Defendant under arrest that you recovered some ammunition, is that correct?

A. Correct.

Q. And, from where did you recover this ammunition?

A. From the Defendant's pants watch pocket.

Q. Officer, do you recall some time that evening where you were interviewed by a police officer—detective—if I may have a moment, your Honor, John Larson, an investigating officer at the 43rd Precinct, when he asked you questions about this arrest, do you recall giving a detailed account of how you—

A. I gave him a brief story of what had transpired. He took down notes and then typed up a Vera report.

Q. Did you—did Police Officer McNamee ever point [12] out to you where he found—where he recovered the gun?

A. No.

Q. You never observed the gun underneath the seat of the car?

A. No.

Q. So, it's—you're testifying that after you engaged in conversation, your brother officer just showed you the gun, pointed—put it in his pocket and you never saw where he got it from, nor—

A. Correct.

Testimony of Police Officer Lawrence Meyer

Q. —engage in any other conversation other than placing this Defendant under arrest, is that correct?

A. Correct.

Q. Do you ever recall telling—informing Detective Larson that after you approached the vehicle, that you made the same observation that your partner made that you sa the handle of the gun protruding from underneath the seat of the—

A. No, what I believe the point you're trying to bring out is—

Q. No, answer the question. Answer the question. Go ahead. Do you recall ever informing Detective Larson that you made the same observation as your partner did?

A. Never did.

Q. Well, I'll show you—mark this Defendant's [13] Exhibit 1 for identification purposes.

The Court: Make it A.

(At this time, a document was marked as Defendant's Exhibit A for identification.)

Court Officer: Defendant's A.

The Court: All right, go ahead.

Q. Officer, I show you defense Exhibit A. Do you know what it is?

A. Yes, this is a precinct Vera report.

Q. Did you read that report after it was made by Detective Larson?

A. I read the report, actually, in—when I was in court in pre-arraignment waiting to have a folder written up by the Assistant District Attorney, at which point, I—there was a discrepancy in the report, and I explained it to him and he made the correction in his folder.

Q. In that report, if you could, does it ever state that you ever told Police Officer—Detective Larson that you made the same observation as to the handle of the gun protruding from the seat as your partner did?

Testimony of Police Officer Lawrence Meyer

* * *

[14]

A. Repeat the last question, please.

* * *

(At this time, the reporter read the requested question.)

A. According to this report, it states that.

The Court: But, the point is, did you tell Detective—the Detective that?

The Witness: No, I never did.

Mr. Campos: I have no further questions of this witness.

The Court: Any redirect?

Mr. Helfer: Just one.

Redirect examination by Mr. Helfer:

[15] Q. On that day, May 11th, 1980, [sic] did you issue any summonses to the Defendant?

A. Yes.

Q. And, what were they for?

A. Unlicensed operator and driving a vehicle with a broken windshield.

Testimony of Police Officer William McNamee

* * *

POLICE OFFICER WILLIAM McNAMEE, Shield Number 29789, 43rd Precinct, Anti-Crime, having been called as a witness for the People, was duly sworn, and testified as follows:

Court Officer: Witness' name is Police Officer [16] William McNamee, M-C-N-A-M-E-E, Shield Number 29789, assigned 43rd Precinct Anti-Crime.

Mr. Campos: Okay, your Honor.
The Court: You're all set?
Mr. Campos: Yea.
The Court: Mr. D.A.?

Direct examination by Mr. Helfer:

Q. Officer McNamee, again, I'll direct your attention to May 11th, this year. Were you working that day?

A. Yes, I was.

Q. And, what was your tour of duty?

A. I was doing ten to six.

Q. Were you working with anybody on that particular day?

A. Yes.

Q. Who was that?

A. Police Officer Meyer.

Q. Did you have occasion to assist Officer Meyer in making an arrest on that day?

A. Yes, I did.

Q. And, what was the name of the person that was placed under arrest?

A. Mr. Class.

[17] Q. And, where was that? Where did that arrest take place?

A. That arrest took place on Westchester and Bronx River Avenue.

Testimony of Police Officer William McNamee

Q. Again, can you tell the Court and Counsel the circumstances leading up to that arrest?

A. While on routine patrol in the confines of the 43rd Precinct, we were proceeding southbound on Bronx River Avenue, when we observed the Defendant driving a Dodge Charger at a high rate of speed with a broken windshield. We made a U-turn.

Q. When you say high rate of speed, can you estimate how fast he was going?

A. A rate of speed for the street, I'd say, was too high for the streets.

Q. Is there any way you could estimate his speed?

A. I really don't know.

Q. Continue.

A. We pulled the Defendant over at Bronx River Avenue and Westchester Avenue. The Defendant got out of his vehicle. He approached us. We got out of our vehicle. He had a conversation with Police Officer Meyer. I approached the vehicle, I opened the door of the vehicle and I looked on the side of the door for a VIN number. I didn't see a VIN on the side of the door, then I went to the dashboard. There was something [18] obstructing the VIN on the dashboard. What it was, I don't know. I pushed it out of the way and as I did that; I looked down and I saw what appeared to me as a handle of a gun sticking out from the driver's seat underneath. I then—

Q. You say what appeared to you a handle of a gun. What did you see, if you can describe it.

A. Well, it was a dark handle of a gun.

Q. What color was it? You say dark. Do you know what color it was?

A. I don't know if it was dark brown or black.

Q. Continue. What did you do?

A. I retrieved the gun from underneath the seat, which was a .22 caliber revolver, loaded with six rounds. I then

gave the gun and the ammunition to Police Officer Meyer to be vouchered at the precinct.

Mr. Helfer: I have no further questions, Judge.
The Court: You can inquire.

Cross-examination by Mr. Campos:

Q. Officer McNamee, did you make any notes or memoranda with respect to this arrest?
A. Yes, I did.
Q. Do you have that with you?
A. They're up in the office.

[19] Mr. Campos: Your Honor, I have not received any notes or memoranda. I have received a copy of the notes and memoranda made by Police Officer Meyer, but I—

The Court: They're in the D.A.'s office. Ask the other officer if he can go up and get them right away.

The Witness: It's in my briefcase.

The Court: It's in his briefcase. You can continue.

Q. Officer McNamee, when you testified that what drew your attention to this Defendant's car was the high rate of speed in which he was driving, is that correct?
A. That's correct.
Q. And, you said it was too high for the streets, is that correct?
A. That's correct.
Q. What do you mean by that it's too high for the streets. Does it mean he was going forty-five miles an hour, thirty-five miles an hour?
A. I really don't know how fast he was going, but it was fast because he passed us at a high rate of speed. I really couldn't tell you what rate of speed he was traveling.

Testimony of Police Officer William McNamee

Q. This was approximately four-thirty in the afternoon on a weekday?

A. Yes.

[20] Q. And, the traffic flow was pretty heavy at that time, is that correct?

A. I imagine it was, yea.

Q. At that intersection, Bronx River Avenue and Westchester Avenue, is a pretty busy intersection.

A. Yes.

Q. Especially at that time.

A. Yes.

Q. When you first noted this Defendant's car, were there other cars—was the traffic flow going northbound, was it heavy or was it—or was it light?

A. I would say it was light.

Q. You say this Defendant had a '72 Dodge Charger, is that correct?

A. That's correct.

Q. Was the car kind of souped up in any way?

A. It had a raised back.

Q. Had oversized tires?

A. Yes.

Q. Sort of looks like race tires on it?

A. Yes.

Q. Was it two door or four door?

A. Two door, I believe.

Q. And, you said it had a cracked windshield, is [21] that correct?

A. That's correct.

Q. On the passenger side or the driver's side?

A. I don't recall.

Q. Do you recall the weather conditions, how the weather that day—

A. No.

Q. Sunny? Was it raining?

A. I don't recall, no.

Testimony of Police Officer William McNamee

Q. You were the recorder in that—in your unmarked car, is that correct?

A. I think I was the operator.

Q. When you began to follow this Defendant after making the U-turn, how fast was it you and your brother officer [were] going?

A. I don't know, just in order to catch up to him. I don't know how fast we were going.

Q. Did you accelerate to a high rate of speed?

A. I imagine we did accelerate.

Q. Did you go through any lights?

A. No.

Q. Did you put any flashers on, like the red flasher that you use to identify yourselves as police officers?

A. I don't know if we had the light on, but we hit the [22] siren.

Q. And, how far did the Defendant's car travel from the first time that you got in the same lane that he was going? How far did you travel?

A. Approximately a block.

Q. And, at that time, you—did you pull over next to him, next to the Defendant's car?

A. Yes.

Q. Was he in—was he waiting for a light?

A. I believe so, yes.

Q. At that time, and you identified yourselves as police officers.

A. That's correct.

Q. There came a time that, then, that my client got out of his car and engaged in conversation with your brother officer, is that correct?

A. That's right.

Q. And, you proceeded to go to Defendant's car, is that correct?

A. That's correct.

Testimony of Police Officer William McNamee

Q. And, did you go to the passenger side first or driver's side?

A. No, the driver's side.

Q. And, were you looking for the Defendant's VIN number [23] at that time?

A. That's correct.

Q. Where was the VIN number located in this car?

A. On the dashboard.

Q. And, it's clearly visible from outside the car, is that correct?

A. Yes, if there's nothing blocking it.

Q. And, you testified there was something blocking it.

A. Yes.

Q. What was blocking it?

A. I don't know. I don't recall. It could have been a piece of paper.

Q. Was the door open or did you open the door of the car?

A. I opened the door of the car.

Q. And, did you—you stated you were looking on the side of the door, is that correct?

A. That's correct.

Q. What were you looking for on the side of the door?

A. On older model cars, the VIN numbers are on the—its door.

Q. Didn't you just testify you saw the VIN on the side of the dashboard?

[24] A. I looked on the side of the door first, then—

Q. How many VIN numbers does a Dodge normally have?

A. They have one as far as I know.

Q. Officer, you then removed this unknown object from the dashboard and you—you saw the VIN number, is that correct?

A. That's correct.

Q. And, did you check it with anything?

A. No.

Testimony of Police Officer William McNamee

Q. Did you copy it down?

A. Police Officer Meyer might have.

* * *

Q. After you looked at the VIN number, what did you further observe then, sir?

A. That's when I looked down and saw what appeared to me as a handle of a gun.

Q. When you first opened the door, you never looked down toward the driver's side?

A. No.

Q. First looked on the side of the door, is that correct?

A. That's right.

[25] Q. When you saw the handle, how much of the handle did you see? Did you see the total part—the whole handle, part of the handle?

A. I'd say it was half a handle.

Q. Did you know it was a gun by your observation?

A. It appeared to me as a gun.

Q. You were not sure?

A. No.

Q. How much of the handle, in terms of inches, for the Court and for the Assistant District Attorney and myself, was protruding, if you can estimate?

A. Approximately an inch.

Q. After you recovered the gun, what did you do with the gun at that time?

A. I put it in my pocket.

Q. Where was the Defendant and your brother officer at this time?

A. They were right in back of the car.

Testimony of Police Officer William McNamee

Q. Of your car or—

A. No, right in back of the Defendant's car.

Q. Did you ever—did you engage in conversation with your brother officer at that time?

A. Yes, I did.

Q. Did you show your brother officer where you got the [26] gun from?

A. Yes.

Q. You did shown him?

A. (Witness nodded.) I don't know. Excuse me. I don't know if I showed him or just told him. I said it was underneath the front seat of the car.

Q. Did you go also, were you toward the front of the car?

A. No. No.

* * *

Q. Did the VIN number on the car match the VIN number on the registration, if you know?

A. I don't know. I imagine it did. Police Officer Meyer I'm sure checked it out.

Q. Officer, you have your memo book now?

A. Yes, I do.

Q. Is that correct? Could you show me the entry you made, if any, of the arrest concerning May 11th?

A. Yes, it's right here.

Q. May I see it?

(At this time, Mr. Campos examined the memo book entry.)

Q. Thank you, Officer. When you stopped the Defendant and placed him under arrest, did he at any time tell [27] you—did you ever ask him if the gun belonged to him?

A. No.

Testimony of Police Officer William McNamee

Q. Did [you] ever ask your brother officer if the gun belonged to him?

A. Not that I know of.

Q. Did he ever say anything to you concerning the gun?

A. No.

Q. Other than the fact that my client was driving without a license, everything in the car concerning insurance and registration checked out to the best of your knowledge, is that correct?

A. As far as I know, yes.

Mr. Campos: I have no further questions of this witness.

* * *

Testimony of Defendant, Benigno Class

* * *

[28]

BENIGNO CLASS, having been called as a witness in his own behalf, was duly sworn, gave his residence as Bronx, New York, and testified as follows:

Court Officer: Witness gives his name as Benigno Class, resident of Bronx.

The Court: Okay.

Direct examination by Mr. Campos:

Q. Mr. Class, in a nice, clear voice, in answering my questions, raise your voice so that the Judge could hear you and the court reporter can take everything down. Where do you live, sir?

A. I live in 1905 Andrews Avenue.

Q. And, with whom do you live, sir?

A. My wife and my kids.

Q. How long have you been living there?

A. I been living there approximately two years now.

Q. Are you employed?

A. Yes.

Q. For whom do you work, sir?

A. Well, right now, they call CBS Toys.

Q. Where is that located?

[29] A. Ten-fifty-five Bronx River Avenue.

Q. And, at the time, on May 11th, the time you were arrested, were you in there?

A. I was coming out of work.

Q. What do you do for CBS Toys?

A. I work in [the] stockroom. I'm a high/low driver. I'm a set-up man.

Q. Mr. Class, directing your attention to May 11, 1981 at approximately four-thirty in the afternoon, can you tell

this Court what happened at the time you got into your car at the time you were stopped by the police officers?

A. What—I had my car parked about, on Bronx River Avenue, just about at the corner, about three cars away from the corner.

Q. Where were you coming from, sir?

A. I was coming out of work.

Q. Continue.

A. I went into the car, started the car, let it warmed up, and went—follow along through. I was going home.

Q. How—do you recall how fast you were driving?

A. I wasn't driving too fast because it was raining.

Q. Was it raining heavily or was it raining heavily [sic] or was it raining lightly?

A. No, earlier, it was raining heavy and it was just like [30] —at the time I got into my car, I had pulled out, it was like sunshower was coming down, more or less.

Q. How far did you drive before you got from—just before you got stopped by the police?

A. Before the police approached me, I got, what, about from my job—from the destination that I pulled out, I say about a half block.

Q. Did you recall, again, how fast you were going, miles per hour, do you recall, if any?

A. The most, maybe twenty.

Q. You recall the traffic conditions at that time on that day?

A. It was about six cars ahead of me.

Q. Do you recall—when was the first time you ever saw the police officers' car? At that time.

A. He pulled out by my lefthand side. That was waiting for the light.

Q. What happened after the police officer pulled over alongside of you?

A. Well, he pulled over alongside of me, told me he's a police officer, pulled over, and [he] was on my left side. I waited for the traffic to go by, I pulled over to my righthand side to the curb, stopped. I got out of my car and approach them.

[31] Q. When you approached them, who did you approach, which police officer, the first police officer that testified or the second police officer that testified?

A. The first police officer testified.

Q. And, what—continue. What happened thereafter?

A. Well, I approached them. I told them what can I do, Officer? He told me about the windshield. I told him, yes, I know, then he asked me for the registration and a license. I gave him the registration, the insurance sticker, and I told him, I have no license on me.

Q. Do you recall what the other police officer was doing at this time?

A. The other police officer, as soon as he went out of his car, he went directly to my car.

Q. Did you see what he did, if anything?

A. Well, he went to my car. He went around, following my car to the front, and came to the driver's side.

Q. What did he do when he got to the driver's side of the car?

A. Well, at that time, I was talking with the other officer. I didn't notice when he went into the car. I didn't notice.

Q. When—did you see him inside your car?

A. I seen the door open, because I turned around, since I [32] was talking to police officer—to the first police officer, I came up, I was talking to him. When I gradually turned around like this, because I approached—I approached them. When I gradually turned around, I seen the other police officer with the—holding my door open to the driver's side. Open.

Q. Did he have anything in his possession at that time?

A. No, not that I know of.

Q. Did the police officer ever show you a gun?

A. He approached me. I was talking to the police officer. He came over. He approached me. He tells me this is yours.

Q. And, what did he show you?

A. He showed me a .22 caliber.

Q. You heard the last police officer, Police Officer McNamee testify that there was a VIN number—he's looking for a VIN number on your car. By the way, is that car yours?

A. No.

Q. Whose car is it?

A. My brother-in-law's.

Q. The VIN number on that car, where is it located?

A. It's located right next to the dash.

[33] Q. Is it visible from outside the car?

A. Yes.

Q. Was there any—if you recall, was there any object covering the VIN number on that day?

A. No. I never keep nothing on the dashboard.

Q. So, it's not necessary to open the door in order to look at the VIN number, is that correct?

A. No.

Q. After Police Officer McNamee got the gun, what happened—what happened thereafter? Were they—did they talk about—did you see them talking about anything?

A. Well, after he got the gun, he just turn me around, shoved me against his car, in front of his car, handcuffed me and threw me in the back seat of his car, wait about five minutes or four minutes, something like that. Squad car came and took me.

Q. What happened to the car thereafter, do you recall?

A. The car, after that, I don't know what happened to it.

Testimony of Defendant, Benigno Class

Q. You have the car in your possession now?

A. Yes.

Q. So, the police gave the car back to your family, is that correct?

A. Yes.

* * *

[35]

Cross-examination by Mr. Helfer:

Q. Mr. Class . . .

A. Yes?

Q. What is the address of the factory where you work?

A. Ten-fifty-five Bronx River Avenue.

Q. And, how far is that from the intersection where you stopped for the light?

A. That's only a block and a half.

Q. All right, and that is the intersection where the police officers pulled you over, is that correct?

A. The police officers, when they first approached me, I was—yes, a half a block down from where I started from, where I pulled out from.

Q. Are you saying they approached you prior to your getting to that traffic light?

A. Yea.

Q. And, where would you say they first approached you?

A. It's a company that's called Dawson.

The Court: With a D?

The Witness: Yes. They make doors. Right in front of them, that's when they first approached me.

[36] Q. How far is that from the toy factory?

A. From the toy factory, that's a half a block.

Q. And, where were they when they first approached you?

A. They just pulled over on my lefthand side.

Q. And, what lane were you in at that point?

A. Over to my lefthand lane. I was going to make a lefthand turn.

Q. And, they pulled over to your lefthand side?

A. They were over the double line.

Q. Over the double line, and did they say anything to you or do anything at that point?

A. Well, he told me—police officer, can you pull over?

Q. He rolled down the window?

A. Yes.

Q. And, you remember which officer spoke to you?

A. The one that was sitting in the passenger side.

Q. You remember whether it was the first officer?

A. That was the second officer that testified.

Mr. Campos: May the record—that's Police Officer McNamee, your Honor.

Q. And, when you pulled over, when you pulled over, was that at the traffic light?

A. I pulled over right on the corner.

[37] Q. Okay. Was there a traffic light there?

A. Yes, right in the corner.

Q. Is there a traffic light in front of this Dawson Company?

A. No.

Q. Okay. How far is it from the Dawson Company to the traffic light?

A. To the traffic light, about a quarter of a block.

Q. Quarter of a block?

A. Yes, I say it's about six cars ahead of me. It was about six cars ahead of me. They pulled over. I was just

about to start for the light when they pulled over on my lefthand side. He didn't show me no shield, nothing. He just tole [sic] me he's police officers, can you pull over, and I pulled over.

Q. You said it was a half a block from the toy company to Dawson, to the front of Dawson, is that correct?

A. Correct, more or less.

Q. You say it's another quarter of a block to the corner . . .

A. To the corner.

Q. . . . of the block where you pulled over. Before, you told us it was a block and a half from the toy company to the traffic light.

[38] A. More or less, it's about a block and a half.

Q. And, where was your car parked?

A. My car was parked almost into the corner of Bronx River Avenue.

Q. Is that the corner where the traffic light is?

A. No.

Q. Which corner is that?

A. I think it's—if I recall, I'm not sure of the name of the street.

Q. If you—when you came out of the toy factory and you walk towards your car, would you be walking in a southerly direction or northerly direction?

Mr. Campos: Of what, your Honor.

The Court: As he came out of the factory.

A. I came out of my job, I went across the street to my car.

Q. Was your car directly across the street from the factory?

A. No.

Q. Where was it?

A. It was, like, bearing to my lefthand side, across the street, more towards the corner.

Q. Okay. The corner away from the traffic light?

A. Yea. See, it's one block. That's all complete block, [39] and then on the other side of the street, it's like two small blocks.

* * *

[40] Q. Mr. Class, the day you were stopped by the police, did you have a license on you?

A. No.

The Court: You have to speak up.

A. No, sir.

Q. On that day, were you a licensed operator?

A. No.

Q. Have you ever had a valid license?

Mr. Campos: Objection, your Honor.

The Court: It's very speculative. No, I'm going to sustain it. On that day, he wasn't, when he was stopped.

Q. Now, the weapon that was recovered, was it yours?

A. Yes.

Q. How long had you had it?

Mr. Campos: Objection, your Honor.

The Court: Overruled.

A. What was the question?

[41] Q. How long had you had that weapon?

A. That weapon, I had a couple of weeks.

Q. Now, can you tell me again what happened once the police pulled you over? You said you moved from the left-hand lane, you pulled over to the righthand side of the street?

A. Yes.

Q. And, where did the police come, did they come behind you or on the side of you? Where?

A. Well, at that time, the police officers got behind me.

Q. Okay. Can you tell me what you did at that point?

A. Well, I pulled over to the curb, got out of my car and I approached the police officer.

Q. Now, when you got out of your car, were the police out of their car?

A. They was in the process of coming out of their car.

Q. Okay. How much distance was there between your car and their car?

A. Say approximately about—maybe eight feet.

Q. Now, eight feet between the front of their car and the back of your car?

A. Yea, more or less, eight to ten feet, more or less.

Q. Eight to ten feet, and what kind of—if that distance was eight to ten feet, what kind of distance was there between your passenger door and the passenger door of [42] the police car?

A. Had to be a farther distance, I guess, or probably the same. I don't know exactly.

Q. Well, how far would you say it was from your passenger door to the rear of your car?

A. I don't understand the question.

Q. How many feet approximately is it between your passenger door, the end of your passenger door to the rear of your car, to the end of your car? How long is that?

A. I don't know exactly, I say maybe about three feet.

Q. And, would you say it's approximately the same distance between the passenger door and the police car to the front of the police car?

A. More or less.

Q. I believe the figure you told me was what, three feet, approximately?

A. Yea, about three feet, maybe. I'm not certain about that.

Q. Where was it that you met the police officer? In other words, when you got out of your car and started

walking toward the police vehicle, where was it that you met the police officer?

A. Well, I started walking toward the police officer, right? He was coming out of his door, the driver's side.

[43] Q. Right.

A. So, as the police officer that I went to, I started talking to, he asked me for the papers. I told him, yes, officer.

Q. Before you go on, you say you started talking to him. Where was it that you first encountered each other, that you first had words with each other?

A. I was by the side of his bumper.

Q. What's that?

A. By the bumper of the car. His door was here (indicating) I was by the bumper.

Q. By the bumper of the police car?

A. The detective's car, yes.

Q. So that at some point, when you had gotten out of your car and walking toward the police car, you saw the police officers get out of the car.

A. Yes, they was getting out.

Q. When you got out of your car, how did you walk over to the police—to the police car?

A. Walked.

Q. Walked slowly, quickly, normally? How?

A. The way I always walk. I guess normally.

Q. Did you have any particular reason for getting out of your car and going to the police car at that point?

[44] A. Well, I guessed that's the logical thing to do. I figure that the logical thing to do, go politely to the man, and you ask him what can I do for you?

Q. You knew where your gun was at that time, is that correct?

A. Excuse me?

Q. You knew where your gun was at that time?

A. Yes.

Q. When you approached the officer, did he say anything to you?

A. Excuse me?

Q. When you approached the officer, did he say anything to you?

Q. Well, he asked me for the papers for the car.

Q. And, you responded by giving him whatever you had.

A. Yes.

Q. And that you had to go back to your car to get it or—

A. No.

Q. You had handed it to that particular first officer who testified right there on the spot, right?

A. Yes.

Q. And, what was the other police officer doing when you were talking to the—

[45] A. The other police officer came out of his car, on the passenger side and walk directly toward my car. The car that he just came out of, and no point he talk to me. He went directly to the car.

Q. When you had words with the first police officer.

A. Yes.

Q. . . . do you remember where the second police officer was?

A. He was already at my car.

Q. And, how far away was he from you?

A. From me? Well, my car was park here (indicating). They stopped about from here to the end of the desk behind me. They stopped about from here.

Q. As you testified before, approximately eight to ten feet, is that right?

A. Yea, right, so I was talking to the other officer, asking me for the papers. When I look like, look, then I seen the other cop in my car.

Q. How far was that from where you were standing?

A. Possibly from the door that he opened up to where I was standing, I said, maybe about six, something like that. I have no ruler magic.

Q. Was there any communication at that point—at the point you were handing the papers over to the first [46] officer? Was there any communication between the first officer and the second officer?

A. Well, I seen the—they looked at each other. That's all. That's all I noticed.

Q. Now, what point did they look at each other?

A. They looked at each other. One was asking for the paper, the other just kept walking. They just took a glance at each other, and the other officer just kept walking.

Q. Mr. Class, when you carried that weapon, where do you carry it?

A. I don't carry that weapon.

Q. Well, you said it was your gun, is that correct?

A. Yes.

Mr. Campos: Objection, your Honor. It's going beyond the scope of the examination.

The Court: Yes, sustained. He admitted it's his gun and it was in the car.

Q. On that particular day, May 11th, 1981, when did you place the gun underneath the seat?

Mr. Campos: Objection, your Honor.

The Court: I have to sustain it. There's no evidence that he did place it under the seat on May 11th.

Q. Mr. Class, on May 11th—

[47] The Court: You're presuming something that's not evidence.

Testimony of Defendant, Benigno Class

Q. On May 11th, 1981, did you place the gun underneath your seat?

Mr. Campos: Objection, your Honor.
The Court: That, I'll allow.

A. Excuse me?
Q. On May 11th, 1981, did you place the weapon underneath the seat?
A. The weapon was underneath the seat.
Q. I'll ask you the question again. On May 11th, 1981, did you place the weapon underneath the seat?
A. No, sir. No.

Mr. Helfer: I have no further questions.
The Court: Any redirect?
Mr. Campos: No, your Honor.
The Court: Thank you, Mr. Class, you may step down. Do you have any other witnesses?

* * *

Order of the New York Supreme Court, Bronx County Denying Suppression

NEW YORK SUPREME COURT

PART 67—COUNTY BRONX

Indictment Number 1552/1981

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS

Defendant

Present:

HON. WILLIAM J. HOLLAND
J.S.C.

Upon the foregoing papers this motion is decided in accordance with the accompanying memorandum decision.

Opinion filed

Dated 10-13-1981

WILLIAM J. HOLLAND
J.S.C.

Findings of Fact and Conclusions of Law of the New York Supreme Court, Bronx County

SUPREME COURT : BRONX COUNTY

CRIMINAL TERM : PART 67

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

HOLLAND, J.:

A Mapp hearing was conducted before this Court on July 10, 1981, and based on the testimony adduced therein, this Court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

Police Officers Lawrence Meyer and William McNamee were the People's sole witnesses, and testified that on May 11, 1981 at approximately 4:30 p.m., they were driving southbound on Bronx River Avenue.

Both officers were in civilian clothes, in an unmarked police car. As the officers proceeded southbound they observed the defendant driving a 1972 Dodge Charger in a northerly direction, at an excessive rate of speed. They also noticed that the windshild [sic] of the defendant's car

was cracked. Making a u-turn, the officers pulled alongside the defendant's car and ordered him to stop. The defendant stopped his car at the corner of Westchester Avenue and Bronx River Avenue, and the officers pulled up directly behind him. The defendant immediately got out of his car and approached the officers, who had gotten out of their car. The defendant engaged Officer Meyer in conversation while Officer McNamee went directly to the defendant's vehicle.

Officer Meyer asked the defendant for his license and registration. The defendant produced a registration and insurance card for the vehicle and gave them to Officer Meyer. He told the officer that he did not have a driver's license. While Officer Meyer questioned the defendant, Officer McNamee checked the door panel for the car's VIN. Unable to find the VIN in the door panel, Officer McNamee opened the car door to clear some papers off the dashboard, so he could see the VIN on the dashboard. (Officer McNamee testified that, depending on the model and year of the car, the VIN can be found either on the car door's panel or on the dashboard).

As Police Officer McNamee looked into the vehicle, he observed the VIN and also saw the handle of a gun protruding from under the driver's seat. Officer McNamee seized the gun and called to his partner, who then placed the defendant under arrest. It was subsequently discovered that the gun was loaded with six live rounds of ammunition.

The defendant, testifying on his own behalf, basically corroborated the Police Officer's testimony in all respects except that the defendant testified that the VIN number was located on the dashboard in plain view and denied that there were any papers on the dashboard covering the VIN number. The defendant also stated that the car did not belong to him, but to his brother-in-law.

Findings of Fact and Conclusions of Law

This Court believes the officers' rendition of the facts, and finds that the VIN number on the dashboard was obstructed at the time Police Officer McNamee approached the vehicle.

CONCLUSIONS OF LAW

It is clear that the occurrance [sic] of a vehicle and traffic law violation provides a legitimate basis for an officer's stopping an automobile, and for the issuance of a automobile, [sic] and for the issuance of a summons (People v. Ingle, 36 N Y 2d 413).

Here, the defendant was observed speeding in a car with a broken windshield. Upon his being stopped he immediately exited his car and approached the police car, rather then [sic] waiting in his car for the officers to approach him. Officer McNamee immediately went to the defendant's vehicle to look for the VIN. This was apparently done to determine if the number had been altered or removed thereby indicating a stolen car.

Unable to locate the number on the door panel, the officer sought to get an unobstructed view of the number on the dashboard. In order to do this he was forced to open the vehicle door and move a piece of paper obstructing the VIN. After opening the door and viewing the VIN, he noticed, in plain view, a gun handle protruding from under the driver's seat.

Although at the time the defendant was stopped there was no reason to believe the vehicle he was driving was stolen, the defendant's conduct, that is, immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession, made these officer's actions quite reasonable and prudent under the circumstances.

The governmental interest in checking an automobile's VIN is obvious. In fact, the purpose of the VIN is to provide a ready means by which to determine if a vehicle is stolen.

Here with the VIN out-of plain sight, the officer merely opened the car door to move the papers obstructing his view. To say that the mere opening of the door to view the VIN is an abuse of the defendant's right to privacy is to reject common sense and practical realty [sic] (People v. De Bour, 40 N Y 2d 215, 217).

Both the United States Supreme Court and the Court of Appeals have held that "the crucial factor in determining the legality of police conduct is whether or not that conduct is reasonable". (Terry v. Ohio, 392 U.S. 1; People v. De Bour, *supra;* People v. Ingle, *supra;* People v. Cantor, 36 N Y 2d 106). Nothing adduced at this hearing indicated to this Court any unreasonable conduct on the part of the police officers. The check of the VIN after a legal stop for traffic violation was certainly reasonable under the specific circumstances, notwithstanding any lack of probable cause to believe the car had been stolen. To say that the officer could not open the car door for the limited purpose of viewing the VIN "would place an unrealistic restriction on the performance of his duty". *De Bour* at 218.

Thus, it is clear to this Court that the police conduct was reasonable, that the governmental interest was substantial, and that any intrusion upon the defendant's right to privacy was minimal.

Accordingly, the defendant's motion to suppress physical evidence, specifically the .22 calibre revolver, is denied.
Dated: October 13, 1981

Notice of Appeal to the New York Supreme Court, Bronx County

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from a judgment of conviction rendered against him on December 10, 1981 in the Supreme Court, Part 80, Bronx County, and from each and every part of such judgment.

Dated:

the 8th day of January 1982

Yours, etc.

BENIGNO CLASS
1893 Andrews
Bronx, N.Y. 10453

/s/ BENIGNO CLASS

To: MARIO MEROLA
District Attorney

Clerk of the Supreme Court

(Affidavit of Service Omitted in Printing)

Judgement of the New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 29, 1983

Present: Hon. John Carro, Justice Presiding
Sidney H. Asch
Samuel J. Silverman
Max Bloom
Bentley Kassal, Justices.

No. 17879

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

BENIGNO CLASS,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, Bronx County (Murray Koenig, J.), rendered on December 10, 1981, convicting defendant of criminal possession of a weapon in the third degree,

And said appeal having been argued by Mark Cogan of counsel for appellant, and by Roger L. Stavis of counsel for respondent; and due deliberation having been had thereon,

It is ordered that the judgment so appealed from be and the same hereby is affirmed. [Carro, J.P., dissents in a memorandum.]

ENTER:

JOSEPH J. LUCCHI
Clerk.

Affirmance Without Opinion and Dissenting Opinion of the New York Supreme Court, Appellate Division, First Department

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BENIGNO CLASS, Appellant.—Judgment, Supreme Court, Bronx County (Murray Koenig, J.), rendered on December 10, 1981, affirmed. Concur—Asch, Silverman, Bloom and Kassal, JJ.

Carro, J. P., dissents in a memorandum as follows: Defendant was stopped for driving 5 to 10 miles above the speed limit and because the windshield on the passenger side was badly cracked. When the officers (who were not in uniform and drove an unmarked patrol car) pulled up next to him, flashed a badge and ordered him to pull over, he did so. Mr. Class got out of the car and walked back to the officers, who had also alighted. One officer asked him for his license and registration, while the other officer went over to the car. Defendant produced an insurance card and the registration, but had no license to show. As defendant and the first officer discussed this, the second officer opened the car door on the driver's side, allegedly to check the Vehicle Identification Number (VIN). There was no VIN on the car door, so the officer (testified that he) checked the dashboard, but it was obstructed by "something", which he pushed away. As he did that he saw what appeared to be the "handle of a gun sticking out from the driver's seat underneath." A .22 calibre pistol was recovered, Mr. Class was arrested and in the ensuing search of defendant, ammunition was recovered. Summonses were also issued for unlicensed operation of a motor vehicle and driving with a broken windshield. The above recitation of the facts is a distillation of the two officers' testimony, which the suppression court accepted. The officers also testified that they had no basis for believing the car to be stolen, the registration papers later checked out as valid (no radio run

was made on the car at any time) and the VIN was never even copied down by the officer who allegedly searched for it. The court below denied defendant's suppression motion by ruling that the gun had been "in plain view" when seized. The court found the initial search for the VIN to be justified, "notwithstanding any lack of probable cause to believe the car had been stolen," because "the defendant's conduct, that is, immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession, made these officer's actions quite reasonable and prudent under the circumstances." Such reasoning bends both logic and the law, the latter in violation of the constitutional prohibition against unreasonable searches and seizures. (U.S. Const., 4th Amdt.) This incident occurred about 4:30 in the afternoon, on a sunny day, right before the onset of rush hour. There was not the slightest hint in the officer's testimony that this was a high crime area or that they were on any more than "routine patrol." The conclusion that defendant's act, of getting out of his car and going to the officers rather than awaiting their approach, constituted suspicious behavior, is absurd. I would do the same thing myself, if for no other reason than the recent tragedies of officers being fired upon as they approach stopped drivers might reasonably create an apprehension that would be dispelled by my exhibiting myself as clearly unarmed. The court's second point is even more illogcial since, by the officer's own testimony, the search of the car by one officer began before the other had yet discovered that defendant was not a licensed driver. Since the search was conducted without any indication of impropriety or preliminary radio run on the license plate, the police action was no more than a wrongful trespass, and the plain view doctrine is inappli-

cable. (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466, 472.) As the Court of Appeals stated many years ago, "[t]here is no question, and the entire court agrees, that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction." (*People* v. *Marsh*, 20 N.Y.2d 98, 100 [per Fuld, Ch. J.], as affd. in *People* v. *Howell*, 49 N.Y.2d 778, 779.) And while the alleged premise here—to search for the VIN —was less intrusive than a full-blown inventory, it still constituted an impermissible search since there was absolutely no predicate for believing the car was stolen. (*Cotton* v. *United States*, 371 F.2d 385, 393-394; *People* v. *Gohn*, 49 A.D.2d 585.) Nor was there any lawful arrest to which the search was incident. (*People* v. *Erwin*, 42 N.Y.2d 1064, 1065.) Since the officer had no right to be in the car, his observation of the gun handle may not be sanctioned by the plain view doctrine. (*Coolidge v. New Hampshire, supra*, *People* v. *Gohn, supra.*)

Order of the New York Supreme Court, Appellate Division, First Department Granting Leave to Appeal to the New York Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE:

JOHN CARRO
Justice of the Appellate Division

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENIGNO CLASS,

I, JOHN CARRO, Justice of the Appellate Division, Supreme Court, First Department, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to CPL 460.20 it is

ORDERED that permission be, and it hereby is, granted to the above-named appellant to appeal to the Court of Appeals.

Dated: New York, N.Y.
December 19, 1983

/s/ JOHN CARRO
Justice of the Appellate Division

* Description of Order: 12/10/81 Sup.Ct. Bx. Co.
Nov. 29, 83/App.Div. 1st Dept.

Notice: *Within 10 days* from the issuance of this certificate, a jurisdictional statement must be filed with the Clerk of the Court of Appeals pursuant to Rule 500.2 of the Court of Appeals Rules.

Judgment of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 520

THE PEOPLE &c.,

Respondent,

v.

BENIGNO CLASS,

Appellant.

The appellant in the above entitled appeal appeared by William E. Hellerstein, Esq., The Legal Aid Society; the respondent appeared by Hon. Mario Merola, District Attorney, Bronx County.

The Court, after due deliberation, orders and adjudges that the order is reversed, motion to suppress granted, conviction vacated and indictment dismissed. Opinion by Judge Kaye in which Chief Judge Cooke and Judges Wachtler, Meyer and Simons concur. Judge Jones dissents and votes to affirm in an opinion in which Judge Jasen concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be

remitted to the Supreme Court, Bronx County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW,

DONALD M. SHERAW,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 27, 1984

Opinion of the New York Court of Appeals

NEW YORK COURT OF APPEALS

No. 520

THE PEOPLE &c.,

Respondent,

v.

BENIGNO CLASS,

Appellant.

(520) Mark C. Cogan & William E. Hellerstein, N.Y. Legal Aid, for appellant.

Mario Merola, DA, Bronx County (Roger L. Stavis & Steven R. Kartagener of counsel) for respondent.

KAYE, J.

A police officer's nonconsensual entry into an individual's automobile to determine the vehicle identification number violates the federal and state constitutions where it is based solely on a stop for a traffic infraction (U.S. Const, 4th Amdt; N.Y. Const, art I, § 12).

On May 11, 1981, in the late afternoon, Police Officers Lawrence Meyer and William McNamee observed defendant driving 5 to 10 miles per hour above the speed limit, in a car with the windshield cracked on the passenger side. The officers drove alongside defendant's car and instructed him to pull over. Defendant followed this directive, emerged

from his car and approached Officer Meyer, the driver of the police car. He provided Meyer with his registration and proof of insurance but stated that he did not have a driver's license in his possession. Meanwhile, Officer McNamee had gone directly to defendant's car, opened the door and checked the left door jamb for the vehicle identification number (VIN). Since the VIN was not located on the door jamb, McNamee reached in and moved papers on the dashboard to enable him to view the VIN. In doing so, he saw a handle of a gun protruding from underneath the seat, seized it, and defendant was promptly arrested.

The hearing court denied defendant's motion to suppress the gun. Although the court concluded that the officers had "no reason to believe the vehicle . . . was stolen" when defendant was stopped, it found their action reasonable in light of defendant's "immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession." Defendant then pleaded guilty to criminal possession of a weapon in the third degree and was sentenced to five years' probation. On appeal to the Appellate Division, the four-Justice majority affirmed without opinion. The dissenting Justice found the search impermissible because "there was absolutely no predicate for believing the car was stolen."

VIN inspections typically involve opening a car door to locate the VIN on the doorpost, opening the hood to locate the VIN on the engine, or looking for the hidden VIN in obscure parts of an automobile. While this court has not previously considered the legality of such inspections conducted without consent, lower courts in this state, as well as courts in other jurisdictions, have approached the question from divergent perspectives. Initially, courts are divided on the threshold issue of whether a VIN inspec-

tion constitutes a search.[1] On the facts presented by this appeal, we conclude that a search was conducted.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy" (*United States* v. *Chadwick*, 433 U.S. 1, 7; see, also, *Katz* v. *United States*, 389 U.S. 347; *People* v. *Perel*, 34 N.Y.2d 462, 466). One has no legitimate expectation of privacy in locations in a car which are observable by passerby. Accordingly, an officer's simply peering inside an automobile does not constitute a search and the Fourth Amendment consequently does not limit this activity (*Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535; *People* v. *Cruz*, 34 N.Y.2d 362, 370). But there are many places inside a car—including the area underneath the seats—which cannot be viewed from the outside and which an individual legitimately expects will remain private. The government intrusion here, Officer McNamee's opening the door and reaching inside, was undertaken to obtain information and it exposed these hidden areas. It therefore constituted a search (cf. *United States* v. *Place*, —— U.S.——, 103 S. Ct. 2637; *People* v. *Miller*, 43 N.Y.2d 789, affg., 52 A.D.2d 425, 428; *People* v. *Sullivan*, 29 N.Y.2d 69).[2]

1. Compare, for example, *United States* v. *Polk* (433 F.2d 644); *United States* v. *Johnson* (413 F.2d 1396, affd. en banc 431 F.2d 441); *Cotton* v. *United States* (371 F.2d 385); *People* v. *Valoppi* (61 Mich. App. 470, 233 N.W.2d 41); and *People* v. *Hart* (75 Misc. 2d 908), with *United States* v. *Powers* (439 F.2d 373, cert. den. 402 U.S. 1011); *Simpson* v. *United States* (346 F.2d 291); *State* v. *Moore* (—— Ha ——, 569 P.2d 70); *People* v. *Piper* (101 Ill. App. 3d 296, 427 N.E.2d 1361); and *State* v. *Simpson* (95 Wash.2d 170, 622 P.2d 1199). Though not treating a VIN inspection as a search, some courts have limited the officers' right to check the VIN "to those cases in which there is a legitimate reason to do so" (see, e.g., *Cotton* v. *United States*, 371 F.2d 385, 393, *supra*). The basis for imposing this limitation is not clear.

2. Although the gun was "protruding" from underneath the seat, Officer McNamee first observed it while conducting the search. The only question, then, is whether the officer had a right to be in the position from which he made his observation.

The absence of any legitimate expectation of privacy in the VIN itself is not determinative of the issue presented. The fact that certain information must be kept, or that it may be of a public nature, does not automatically sanction police intrusion into private space in order to obtain it. In particular, the existence of a VIN on every automobile cannot enable police, without any basis, to make "wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen." (1 W. LaFave, Search and Seizure, § 2.5, p. 360.)[3]

A VIN inspection normally involves a lesser invasion of privacy than a full-blown search because of the fixed, known and readily accessible location of the VIN on the automobile. Additionally, there is a compelling police interest, in situations such as automobile thefts and accidents, in the positive identification of vehicles. Consequently, it may well be that some lesser justification than probable cause would be appropriate. However, it is unnecessary in this case to determine whether probable cause or a lesser justification should have been required to support the search, because here there was no semblance of either. The trial court based its apparent finding of reasonable suspicion to believe the car was stolen on two factors: defendant's exiting the vehicle and approaching the officers and his failure to produce a driver's license. But a driver's emergence from a car upon being stopped by police is not indicative of criminal activity. Nor was reliance properly placed by the court on defendant's failure to produce a license because McNamee, having proceeded directly to defendant's car, was not even aware of that fact when he entered the automobile. Since competing inferences cannot reasonably be

3. We are not confronted with a governmental intrusion so circumscribed as to expose only information or articles in which there is no legitimate expectation of privacy (compare *United States* v. *Place*, 103 S. Ct. 2637, *supra*; *Smith* v. *Maryland*, 442 U.S. 735). Nor are we concerned here with an inventory of an impounded car.

drawn from the undisputed facts presented, the hearing court erred as a matter of law in finding reasonable suspicion to believe the car was stolen (see *People* v. *Harrison*, 57 N.Y.2d 470, 477). The facts reveal no reason for the officer to suspect other criminal activity or to act to protect his own safety (compare *People* v. *David L.*, 56 N.Y.2d 698, cert. den., 459 U.S. 866). The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction, an offense which, standing alone, did not justify the search (cf. *People* v. *Marsh*, 20 N.Y.2d 98).

Some lower court cases in New York have interpreted subdivision 4 of section 401 of the Vehicle and Traffic Law as authorizing VIN inspections (see, e.g., *People* v. *Gohn*, 49 A.D.2d 585; *People* v. *Frank*, 61 Misc.2d 450; *People* v. *Goldstein*, 60 Misc.2d 745.) That section provides, in pertinent part:

> Carrying certificate of registration. Every person operating a motor vehicle or a motor vehicle and a trailer, registered or transferred in accordance with any of the provisions of this chapter, shall upon demand of any magistrate, motor vehicle inspector, peace officer, acting pursuant to his special duties, or police officer produce for inspection the certificate of registration or the registration renewal stub for such vehicle and shall furnish to such magistrate, inspector, officer or police officer any information necessary for the identification of such vehicle and its owner, and all information required concerning his license to operate, if he is required by law to have such a license, and shall, if required, sign his name in the presence of such magistrate, inspector, peace officer or police officer as a further means of identification.

In section 401, however, the Legislature has seen fit only to authorize an officer to *demand* information necessary to identify the car, as he may *demand* the certificate of registration for the vehicle.[4] No basis has been shown for ignoring this legislative direction. Here, had the officer complied with the statute and demanded exhibition of the VIN, defendant could have avoided the intrusion on his privacy interests by simply moving the papers on the dashboard, thereby facilitating the officer's observation of the VIN through the windshield. Section 401, therefore, provided no justification for the officer's entry of defendant's car.

Accordingly, the order should be reversed, the motion to suppress granted, the conviction vacated and the indictment dismissed.

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4. No suggestion has been made that the police without basis could search the person of the driver or the interior of the vehicle to obtain a registration certificate, yet the statutory provision is no different for the VIN and the certificate of registration; in both instances the information must be provided on demand of a police officer.

Dissenting Opinion of the New York Court of Appeals

JONES, J. (dissenting):

I would affirm the order of the Appellate Division which upheld Criminal Term's denial of defendant's motion to suppress the .22 calibre revolver. I do not differ with the majority's recital of the facts; I do depart, however, from the legal conclusion that it reaches.

It is undisputed that the police were warranted in stopping defendant's 1972 Dodge Charger. They had observed that it was travelling in excess of the speed limit and that it had a cracked windshield. In this circumstance they were justified not only in stopping the vehicle but thereafter in obtaining its vehicle identification number (VIN).

The requirement that each motor vehicle be assigned a VIN is for the purpose of facilitating rapid, positive identification of each particular motor vehicle. The VIN is functional only when affixed to the particular vehicle and comes into the owner's possession solely by reason of such affixation. The letters and digits constituting the VIN (as distinguished from the tab on which they may be imprinted) have no independent existence and are not susceptible of being possessed by the owner separate and apart from his possession of the vehicle or of being independently "seized" by the police.

The Supreme Court of the United States and our Court have recognized that the owner of a motor vehicle has only a diminished expectation of privacy with respect to the contents of an automobile that is being operated on the highway (*United States* v. *Chadwick*, 433 U.S. 1, 11-13; *People* v. *Belton*, 55 N.Y.2d 49, 53). With respect to a VIN affixed to a motor vehicle, however, once the vehicle is on the high-

way the owner can have no expectation of privacy.[1] The purpose of the VIN is to proclaim the identity of the vehicle, a purpose quite inconsistent with any legitimate privacy interest of the owner.

The police on the other hand have a compelling interest, usually in the identification of a particular motor vehicle, but always in the ready availability of a near-infallible method of vehicular identification. Positive identification of a motor vehicle may be sought by them for a variety of regulatory and administrative objectives as, for example, to establish correlation with a registration certificate produced by the driver, to make positive identification of a vehicle involved in an accident, or to determine whether the vehicle has been stolen. Its identification may also be sought, of course, for purposes of recovery of a vehicle previously known to have been stolen, but in many instances when inspection of the VIN is made the police have no intimation of actual pre-existent criminal activity. Familiar concepts with respect to the necessity for probable cause to justify a search for or seizure of criminal evidence or contraband would be applicable to VIN inspection only if the objective of the police action was search for proof with respect to known or suspected pre-existing criminal activity. These concepts are immaterial and have no application where, as here, there is no evidence that such was the purpose of police inspection of the VIN, the objective of which was identification of the vehicle only, with no

1. A large number of cases have expressly held that there is no expectation of privacy in a VIN (e.g., *United States* v. *Powers*, 439 F.2d 373 [4th Cir.], cert. den., 402 U.S. 1101; *United States* v. *Polk*, 433 F.2d 644 [5th Cir.]; *United States* v. *Graham*, 391 F.2d 439 [6th Cir.], *cert. den.*, 393 U.S. 941; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.]; *State* v. *Colon*, 316 A.2d 797 [Conn. Cir.]; *Commonwealth* v. *Hason*, 439 N.E.2d 251 [Mass.]; *People* v. *Brooks*, 274 N.W.2d 430 [Mich.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.]; *People* v. *Valoppi*, 233 N.W.2d 41 [Mich. App.]; *Commonwealth* v. *Grabowski*, 452 A.2d 827 [Pa. Super.]).

thought of connection with known or suspected previous criminal activity. The purpose of the police was to obtain information, not to seize physical evidence.[2]

In sum, except possibly in exceptional circumstances, I would hold that whenever the police are justified in making a traffic stop (cf. *People* v. *Ingle*, 36 N.Y.2d 413) they are authorized to inspect the VIN.

After the concededly permissible traffic stop in this instance Officer McNamee opened the driver's door of the vehicle in expectation of finding the VIN on the inside panel of the door. Not finding it there he went directly to the

2. Several courts have adopted the view that entry into a motor vehicle to find the VIN is not a search for purposes of the Fourth Amendment (e.g., *United States* v. *Forrest*, 620 F.2d 446 [5th Cir.]; *United States* v. *Duckett*, 583 F.2d 1309 [5th Cir.]; *United States* v. *Williams*, 434 F.2d 681 [5th Cir.]; *United States* v. *Polk*, 433 F.2d 644 [5th Cir.], *supra*; *United States* v. *Johnson*, 413 F.2d 1396, *affd. en banc*, 431 F.2d 441 [5th Cir.]; *United States* v. *Graham*, 391 F.2d 439 [6th Cir.], *cert. den.*, 393 U.S. 941, *supra*; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.], *supra*; *Cotton* v. *United States*, 371 F.2d 385 [9th Cir.]; *State* v. *Renfrow*, 597 P.2d 546 [Ariz.]; *State* v. *Cohn*, 284 So.2d 426 [Fla. App.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.], *supra*; *People* v. *Valoppi*, 233 N.W.2d 41 [Mich. App.], *supra*; *Fox* v. *Commonwealth*, 189 S.E.2d 367 [Va.]. Many courts have upheld the VIN inspection, even if it be termed a search, in circumstances amounting to less than probable cause (e.g., *United States* v. *Dadurian*, 450 F.2d 22 [1st Cir.], *cert. den.*, 405 U.S. 1044; *United States* v. *Powers*, 439 F.2d 373 [4th Cir.], *cert. den.*, 402 U.S. 1101, *supra*; *United States* v. *Duckett*, 583 F.2d 1309 [5th Cir.], *supra*; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.], *supra*; *United States* v. *Powless*, 546 F.2d 792 [8th Cir.]; *United States* v. *Brown*, 535 F.2d 424 [8th Cir.]; *Cotton* v. *United States*, 371 F.2d 385 [9th Cir.], *supra*; *State* v. *Renfrow*, 597 P.2d 546 [Ariz.], *supra*; *State* v. *Colon*, 316 A.2d 797 [Conn. Cir.], *supra*; *People* v. *Wolf*, 326 N.E.2d 766 [Ill.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.], *supra*; *Wood* v. *State*, 632 S.W.2d 734 [Tex. App.]; *Fox* v. *Commonwealth*, 189 S.E.2d 367 [Va.], *supra*; cf. *United States* v. *Squires*, 456 F.2d 967, 970 [2d Cir.]). Research has disclosed only six reported cases in which police inspection of a VIN has been struck down (*United States* v. *Nikrasch*, 367 F.2d 740 [7th Cir.]; *Simpson* v. *United States*, 346 F.2d 291 [10th Cir.]; *State* v. *Moore*, 659 P.2d 70 [Haw.] *People* v. *Piper*, 427 N.E.2d 1361 [Ill. App.]; *State* v. *McGann*, 467 A.2d 571 [N.H.] *State* v. *Simpson*, 622 P.2d 1199 [Wash.]).

other location where to his knowledge the VIN would be found—on top of the dashboard on the driver's side. When he observed that view of the VIN in that location was obscured by some papers, he reached inside the vehicle and moved them aside to view the VIN. That he did not first request defendant to remove the papers or seek his consent to do so is immaterial; such consent could not permissibly have been withheld. The officer was not searching for or intending to seize any physical evidence on the ground that he had probable cause to believe that a crime had been committed; he was seeking information relevant and appropriate to the traffic stop which all concede he had been authorized to make.

The right of the police to inspect the VIN affixed to a motor vehicle is to be distinguished from the right of the police to search for or to seize a vehicular registration certificate. Registration of a motor vehicle, with the related license plates, in contrast to a VIN, serves to describe a vehicle and identify its owner and constitutes proof that the vehicle has been properly licensed for operation on the highway for a specified period of time, customarily one year. In the course of its life a motor vehicle may be, and customarily is, the subject of several different registration certificates, reflecting different periods of licensing and usually successive ownership. A registration certificate may be independently possessed by its owner, on his person, in the glove compartment of the vehicle, or otherwise. Without probable cause the police would have no right to search the person of the driver or the interior of the vehicle to obtain a registration certificate. Penalties might attach to the failure of the driver to produce the registration certificate, but that fact would not enlarge the right of the police to search. The VIN, however, is intended to be indelibly affixed to the particular vehicle throughout its existence, irrespective of changing ownership of the vehicle

and whether or not it is licensed for operation on the highway. As its name states, its purpose is vehicle registration without reference to ownership or licensure for operations.[3]

Inasmuch as in this instance the police had the right to inspect the VIN of the 1972 Dodge[4] and the revolver was observed inadvertently and without intention to search for it, under the plain view doctrine it should not be suppressed (see *Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535).

* * * * * * * * * * * * * * *

Order reversed, motion to suppress granted, conviction vacated and indictment dismissed. Opinion by Judge Kaye in which Chief Judge Cooke and Judges Wachtler, Meyer and Simons concur. Judge Jones dissents and votes to affirm in an opinion in which Judge Jasen concurs.

Decided November 27, 1984

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3. The right to inspect the VIN would not, of course, justify a rummaging search of a motor vehicle. The officer would be warranted only in going directly, as he did in this case, to a location where by the officer's advance knowledge the VIN was to be found. By like token, a pretext search would not be condoned.

4. I would reach this result without reference to the provisions of Vehicle and Traffic Law, § 401(4).

No. 84-1181

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IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PETITIONER

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Argument	
The actions of a police officer taken to effect a routine inspection of the Vehicle Identification Number of an automobile driven by respondent, an unlicensed operator, following the lawful stopping of the vehicle for two traffic violations, did not violate respondent's Fourth Amendment rights	11
A. In the context of a lawful, routine stop for a traffic infraction, the police officer's act of opening the driver-side door of the automobile, and his reaching within to move a scrap of paper blocking his inspection of the VIN, otherwise viewable through the windshield, was not a "search" within the meaning of the Fourth Amendment	16

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B. If the mere opening of the automobile's front door and the police officer's limited entry into the interior of the passenger compartment for the sole purpose of exposing the dashboard VIN to visual inspection constituted a "search," it was a patently reasonable "search" satisfying the requirements of the Fourth Amendment 27

C. Once respondent was lawfully stopped for a traffic infraction, his status as an unlicensed driver deprived him of any legitimate and reasonable expectation of privacy with respect to the passenger compartment of the automobile that might have served to prohibit a policeman's non-consensual entry. 34

D. The search of respondent's vehicle incident to his seizure for a routine traffic violation was justified under *New York* v. *Belton*, 453 U.S. 454 (1981) 38

Conclusion 50

Question Presented

Whether the New York Court of Appeals erroneously construed the Fourth Amendment by holding that the actions of a police officer, who had lawfully stopped respondent's automobile for a traffic infraction and was attempting to inspect routinely the car's vehicle identification number (VIN), ordinarily viewable through the windshield, by pushing aside some papers on the dashboard which obstructed it, constituted an impermissible search of the vehicle.

TABLE OF AUTHORITIES

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Cases:

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Illinois v. Andreas, 463 U.S. 765 (1938) 18
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Sibron v. New York, 392 U.S. 40 (1968) 46
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Smith v. Illinois, —— U.S. ——, 83 L.Ed.2d 488 (1984) 49
Smith v. Maryland, 442 U.S. 735 (1979) 18
South Dakota v. Opperman, 428 U.S. 364 (1976) 20, 35, 48
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State v. Christian, 189 Conn. 35, 454 A.2d 262 (Conn. 1983) 42

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State v. Hehman, 90 Wash.2d 45, 578 P.2d 527 (Wash. 1978) (en banc) 43
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State v. Rice, 69 Ohio St.2d 422, 433 N.E.2d 175 (Oh. 1982) 43
State v. Roberson, 156 N.J. Super. 551, 384 A.2d 195 (N.J. App. 1978) 43
State v. Sedacca, 252 Md. 207, 249 A.2d 456 (Md. App. 1969) 17
State v. Sidebotham, 124 N.H. 682, 474 A.2d 1377 (N.H. 1984) 17
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United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978) 16
United States v. Forrest, 620 F.2d 446 (5th Cir. 1980) 16

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United States v. Graham, 391 F.2d 439 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968) 16
United States v. Griffin, 729 F.2d 475 (7th Cir.), *cert. denied*, —— U.S. ——, 83 L.Ed.2d 60 (1984) 35
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United States v. Karo, 468 U.S. ——, 82 L.Ed.2d 530 (1984) 18
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United States v. Ragsdale, 470 F.2d 24 (5th Cir. 1972) 31

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United States v. Riggs, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973) 46
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United States v. Williams, 434 F.2d 681 (5th Cir. 1970), *cert. denied*, 401 U.S. 1011 (1971) 20
United States v. Wood, 500 F.2d 681 (5th Cir. 1974) 16
United States v. Zemke, 457 F.2d 110 (7th Cir.), *cert. denied*, 406 U.S. 947 (1972) 17

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North Carolina Gen. Stat. § 20-183(a) (1983) 43
Oregon Rev. Stat. § 484.353(2)(a) (1985) 43
Virginia Code § 46.1-178.01 (1984) 43
Wisconsin Stat. § 345.22 (1984) 43

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Other Authorities:

FBI Press Release of May 12, 1985 41
Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* (5th ed. 1980) 43
LaFave, *Case-By-Case Adjudication Versus Standardized Procedures: The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127 41
1 W. LaFave, *Search and Seizure* § 2.5 22
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National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance (Supp. 1979) 43, 45
State of New York, Division of Criminal Justice Services, Uniform Crime Reporting Statistics, 1979-1983 23
R. Stern and E. Gressman, *Supreme Court Practice*, (5th ed. 1978) 34
1984 New York Statewide Police Information Network, Year End Report 20

No. 84-1181

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the New York Court of Appeals (A. 55)* is reported at 63 N.Y.2d 491, 483 N.Y.S.2d 181, 472 N.E.2d 1009 (1984).

Jurisdiction

The judgment of the New York Court of Appeals was entered on November 27, 1984 (A. 53). The petition for a writ of certiorari was filed on January 18, 1985 and certiorari was granted on April 1, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

* Numerals preceded by "A." refer to pages of the Joint Appendix.

Constitutional Provisions Involved

Amendment IV of the United States Constitution provides:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the United States Constitution provides:

> Section 1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

On May 11, 1981, in the late afternoon, Police Officers Lawrence Meyer and William McNamee observed respondent driving above the speed limit in a car with a "broken" windshield (A. 11-12, 13, 16, 21, 22, 23).* The officers drove alongside respondent's 1972 Dodge Charger, as he came to a halt at a traffic light, and ordered him to pull the car over (A. 12, 13, 14-15, 21, 23, 24). After complying with this directive, respondent emerged from his vehicle and approached Officer Meyer, the driver of the police car (A. 12, 15, 21, 24). Although he furnished the police officer with a registration certificate** and proof of insurance, respondent was unable to produce a driver's license because he was, in fact, unlicensed (A. 12, 15, 28, 31, 36).

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* Respondent was issued traffic summonses for driving a vehicle with a broken windshield and driving without a license (A. 19).

** The car was not respondent's, but belonged, as it was learned later, to his brother-in-law (A. 32).

Meanwhile, Officer McNamee, who had gone directly to respondent's car, opened the door to inspect the vehicle identification number (VIN), frequently located on the door jamb of older model cars (A. 12, 15, 21, 24-25). Unable to find it there, however, the officer turned his attention to the top of the dashboard, but was prevented from inspecting the dashboard VIN by looking through the windshield from without because a piece of paper obstructed the VIN plate (A. 21, 25). Reaching inside the vehicle to move the piece of paper, Officer McNamee saw not only the VIN, but the handle of a gun in plain view, protruding from underneath the seat (A. 21, 25, 26). He promptly seized the loaded pistol and placed respondent under arrest (A. 12-13, 15, 20, 21-22, 26).

Prior to trial, respondent moved to suppress the weapon on the ground that "the search of the car was unreasonable and violative of defendant's Constitutional rights" (A. 7-8). The court denied the motion after an evidentiary hearing (A. 42). In denying the motion, the hearing court recognized the "obvious" governmental interest in inspecting a VIN plate, the very purpose of which ". . . is to provide a ready means by which to determine if a vehicle is stolen" (A. 46). Since a VIN inspection could not infringe respondent's right to privacy, the hearing court concluded that "[t]he check of the VIN after a legal stop for [a] traffic violation was certainly reasonable under the specific circumstances, notwithstanding any lack of probable cause to believe the car had been stolen" (A. 46). Following the denial of his motion to suppress, respondent pleaded guilty to the crime of Criminal Possession of a Weapon in the Third Degree [N.Y. Penal Law § 265.02(4) (McKinney 1984)], but preserved the right to raise the denial of his suppression motion as an issue on appeal.* Respondent was sentenced to a probationary term not to exceed five years.

* The right to appeal the suppression order was preserved pursuant to New York Criminal Procedure Law section 710.70(2) (McKinney 1984), which provides for review of these orders notwithstanding the subsequent entry of a guilty plea.

The Decision of the New York Supreme Court, Appellate Division, First Department

Respondent's judgment of conviction was affirmed without opinion by a four-justice majority of a panel of the New York Supreme Court, Appellate Division, First Department (A. 49). In a separate dissent, Justice John Carro asserted that because respondent's conduct was not suspicious, there was no predicate for believing his car was stolen and, thus, the "search" for the VIN was unreasonable under the Fourth Amendment (A. 49-51).

The Decision of the New York Court of Appeals

In a 5 to 2 decision, the New York Court of Appeals reversed the order of the Appellate Division and ordered the suppression of the weapon and the dismissal of the indictment (A. 53-54). In its opinion, the majority held that, by opening respondent's car door, and by reaching within to move the paper covering the dashboard VIN, the officer exposed "hidden areas" of the vehicle and, thus, conducted a "search" within the meaning of the Fourth Amendment (A. 57). The majority concluded that the commission of an ordinary traffic infraction could not justify such an intrusive "search" (A. 59). The court considered respondent's status as an unlicensed driver to be irrelevant to its analysis, because Officer McNamee was unaware of this fact when he attempted to inspect the VIN (A. 58).

The dissent, however, argued that there could be no "expectation of privacy" in a VIN which existed solely to "proclaim the identity of the vehicle" and, thus, that its inspection was justified following the lawful stop for a traffic infraction (A. 61-62).

Summary of Argument

This is a case in which respondent, an unlicensed driver operating a motor vehicle on the streets of The Bronx, was ordered to pull over by police officers who were on motor patrol because they saw respondent commit two traffic violations. It is undisputed that this initial seizure of respondent and the automobile he was driving was lawful. This case, therefore, presents the important and recurring question of whether, in connection with a lawful traffic stop, police officers may make a minimally intrusive entry into the interior of the vehicle for the limited purpose of routinely inspecting the automobile's vehicle identification number (VIN). Here, the VIN was located on the top of the vehicle's dashboard, and would ordinarily have been viewable from outside the vehicle but for the fact that respondent had allowed a scrap of paper to settle on top of the VIN, thereby obscuring it. As respondent had, of his own volition, already vacated the vehicle, one of the police officers attempted to effect a VIN inspection by merely reaching into the vehicle, through the door which he had opened, in order to remove the piece of paper covering the VIN. In doing so, the officer noticed on the floor of the vehicle a loaded pistol, sticking out from under the driver's seat, which was then seized by the officer.

A. The New York Court of Appeals' reversal of repondent's conviction and the suppression of the pistol were predicated upon an erroneous holding that the police officer violated respondent's Fourth Amendment rights because in opening the door and then reaching within to expose the VIN for a routine inspection, he had conducted an illegal "search" of the automobile. The New York Court of Appeals concluded that in the context of a routine traffic stop, the Fourth Amendment requires that before a "search" of the vehicle related to a VIN may occur, there must exist a

basis to believe, whether it be "probable cause or some lesser justification," that a more serious crime, independent of the observed traffic infractions, has taken place (A. 58).

The New York Court of Appeals erred in determining that a "search," as that term applies to the Fourth Amendment, occurred here because the police officer did not invade any "reasonable expectation of privacy" that respondent might have justifiably possessed. This Court has long recognized that in contrast to the home, there is a reduced expectation of privacy with respect to one's automobile, and that lesser expectation of privacy is due in large part to "the pervasive regulation of vehicles traveling the public highways .... The public is fully aware that it is accorded less privacy in its automobile because of the compelling governmental need for regulation." *California* v. *Carney*, —— U.S. ——, 53 U.S.L.W. 4521, 4523 (1985). Central to that regulatory scheme is the VIN, which is the only certain device by which to achieve the positive identification of a particular vehicle.

The VIN serves not only as the most effective tool in the battle against our national car-theft epidemic, but also as the primary means by which compliance with vehicle registration, safety inspection, and liability insurance regulations may be assured. Required now by federal regulation to be located in a position ordinarily easily viewable from outside the vehicle, there can be no question that the VIN plate is intended to be accessible for routine inspection in order to satisfy legitimate governmental and societal interests. Indeed, it is generally unlawful for an owner of a vehicle to remove the VIN plate, or alter it in any way. Quite simply, the VIN plate has been placed on the car for the primary purpose of permitting the police and other governmental agents to inspect it and, therefore, the individual may not possess a reasonable expectation of privacy with respect to the VIN plate itself, or the information it possesses. Although we are mindful that police officers may

not arbitrarily stop vehicles proceeding along the highway for the sole purpose of conducting a VIN inspection (*Delaware* v. *Prouse*, 440 U.S. 648, 659 [1979]), once police officers have lawfully seized a vehicle and its driver because of a traffic infraction, surely the routine VIN inspection may be carried out in conjunction with the license and document inspection which lawfully attends the traffic stop.

The New York Court of Appeals' incorrect conclusion that a "search" took place here because the police officer's act of opening the door and reaching within the passenger compartment exposed "hidden areas" of the vehicle fails to consider that there are many situations, including the one present here, that may arise during the course of a routine traffic stop in which limited police entry into the seized vehicle may be necessary, but which cannot be logically categorized as "searches." For example, when a stopped motorist emerges from his vehicle and walks to the police car, an investigating officer must have the right to enter the stopped vehicle and turn off the ignition if the motor has been left running; if the car poses a potential hazard to other traffic, the officer must be allowed to reach in and turn on the automobile's warning flashers; if stopped on an incline, the police officer must be allowed to enter the vehicle to set the emergency brake. Perhaps most importantly, if, as here, the police are confronted with an unlicensed driver, it is critical that he not be allowed to operate the vehicle any further, and police entry to park the car, secure it, or prepare it for towing and impoundment must be countenanced.

Although it is true, as the New York Court of Appeals noted, that the police officer here was in pursuit of "information" when he entered the vehicle, the quest for information with respect to which there can be no reasonable expectation of privacy—the VIN—could not convert this particular entry into a "search" within the meaning of the Fourth Amendment. The incidental exposure of some "hidden areas" near the floor of the vehicle was merely a minor matter ancillary to the police officer's quite limited,

minimal entry into the vehicle for the proper purpose of making possible a VIN inspection.

Indeed, this should not be viewed as a "search" because there was no effort at all to locate contraband, evidence of a crime, private property or personal information of any type. There was no rummaging search of the traditional sort, no opening of sealed containers, and the police officer did not even look under the seats. We believe that under these circumstances the Court should find that there was no "search" here, within the meaning of the Constitution, and as a matter of simple common sense.

There is no merit to the New York Court of Appeals' suggestion that the police conduct here would have been lawful if the officers had directed respondent to reenter his vehicle and expose the VIN himself. Had the police followed that advice, they would have been required to send respondent back into an automobile where a loaded pistol lay within his easy reach. A due regard for the safety of the police officer should make unnecessary the pursuit of such a dangerous course of action.

B. 1. If a "search" did take place here, then the considerations which governed this Court's decision in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), compel the conclusion that the search was a "reasonable" one because it was nothing more than a *de minimus* incremental intrusion following the lawful stopping and "seizure" of respondent's automobile for the traffic violations. The limited additional intrusion engendered by the VIN inspection related directly to, and was justified by, the traffic violations which inspired it.

2. Moreover, after the stopping of the vehicle, one of the police officers learned that respondent was an unlicensed driver. Too, the vehicle registration which respondent tendered to that officer showed that the car was owned by someone else, ultimately determined to be respondent's brother-in-law, a fact that could not be ascertained at the

scene of the traffic stop. The New York Court of Appeals refused to attribute this additionally obtained information to the other officer, who was contemporaneously conducting the VIN inspection, and this aspect of the court's ruling was also incorrect. The collective knowledge of all of the police officers present at the scene of a traffic incident or street encounter should govern the determination of whether the totality of the state action taken against the individual citizen was "reasonable" under the Fourth Amendment. Beyond question, the totality of the information known by both of these officers provided ample justification for the VIN inspection.

3. But, even if the additionally learned facts are not to be imputed to the officer who sought to inspect the VIN, his actions were reasonably undertaken, being directly related to, and occurring as a reasonable part of, the routine document inspection following this lawful traffic stop. The VIN inspection that he wished to conduct is similar in many ways to the warrantless and unsuspicioned "administrative searches" taken with respect to "pervasively" regulated industries that have been upheld by this Court. As the private and commercial use of the automobile on the public highways is also the subject of "pervasive" regulation, this minimally intrusive entry for the purpose of carrying out the legitimate regulatory interests of society, predicated as it was in this case on the lawful seizure of the vehicle for two traffic violations, must be sustained if the Court is not to render those important regulatory efforts nugatory.

C. Regardless of whatever reasonable expectations of privacy may be possessed by the licensed driver who becomes the subject of a roadside stop for a traffic infraction, certainly those of respondent, an unlicensed driver, were substantially diminished once his illegal operation of the vehicle triggered a lawful police decision to pull him over. As soon as this occurred, respondent had to be charged with the reasonable awareness that the police, upon learning of his status as an unlicensed driver, would have the duty and obligation to assume full dominion and control of the vehicle.

It was necessary that respondent's ability to operate the vehicle be immediately terminated, and this had to justify some degree of police intrusion into the interior of the vehicle. Respondent's wrongful presence behind the steering wheel of that automobile moving through the streets of The Bronx denied him the right to object to the limited police entry of the type that occurred here during the course of the lawful traffic stop. Indeed, respondent's unlicensed operation of the vehicle allowed its impoundment and towing, which could have been attended by a complete inventory search of its interior. Hence, the limited, minimal entry which actually took place was not as severe an intrusion as was permitted under these circumstances.

D. Finally, since the weapon was recovered from respondent's vehicle following its stop for a traffic violation which, without more, could have resulted in respondent's full custodial arrest, the instant case presents the question left open in *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1211 (1983): whether in the context of a routine stop for a traffic violation, "if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may nevertheless conduct a search as broad as those authorized by Belton and Ross." Had the police first arrested respondent they clearly could have searched his vehicle incident to that arrest in order to preserve their safety. Their decision not to arrest respondent initially should not have worked to their detriment by preventing the officers from undertaking the same protective action, insofar as the risks inherent in a routine traffic stop are even greater when the traffic offender is neither handcuffed nor arrested. In order to further a policy of not arresting traffic offenders summarily when the apparent circumstances might seem initially to warrant only the issuance of a traffic ticket, officers such as those in the instant case, who respect the liberty interests of motorists and choose not to effect their full arrests prior to performing document and VIN inspections, must not be placed in any greater jeopardy, and should, therefore, be permitted limited protective searches of the stopped vehicles' passenger compartments.

ARGUMENT

The actions of a police officer taken to effect a routine inspection of the Vehicle Identification Number of an automobile driven by respondent, an unlicensed operator, following the lawful stopping of the vehicle for two traffic violations, did not violate respondent's Fourth Amendment rights.

In *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979), the Court observed that "[v]ehicle stops for traffic violations occur countless times each day; and on these occasions licenses and registration papers are subject to inspection and drivers without them will be ascertained." The present case emanates from one of those "countless" routine, lawful traffic stops. On May 11, 1981, respondent was driving a 1972 Dodge Charger with a broken windshield at an excessive rate of speed through the streets of The Bronx when he was pulled over by New York City Police Officers McNamee and Meyer, who were on patrol duty in an unmarked radio car. There is no dispute, for there can be none, that this initial police "seizure" of respondent was in compliance with the Fourth Amendment, as both speeding and driving an automobile having a broken windshield are violations of New York's Vehicle and Traffic Law. N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984) During the routine police inquiry immediately following the stop, for which respondent had left his vehicle and approached the police car, respondent displayed to Officer Meyer, with whom he spoke, a registration certificate and insurance card which indicated that the automobile belonged to someone else (respondent's brother-in-law [A. 32]). Additionally, respondent's status as an unlicensed driver was revealed, establishing that he had no right to operate a motor vehicle anywhere in New York. N.Y. Veh. & Traf. Law § 509 (McKinney 1984).

While respondent spoke with Officer Meyer, his partner, Officer McNamee, had walked over to the vehicle respondent had been driving to perform the routine task of looking at

the automobile's vehicle identification number (VIN).* Officer McNamee believed the VIN plate would be affixed to the driver's door-jamb because this was an "older car," and he thus opened the driver-side door to conduct his inspection of the VIN. When he saw no VIN located there, Officer McNamee stepped over to the car's windshield, and, from outside the car, tried to look through the windshield

* The Vehicle Identification Number (VIN) is a serial number which, pursuant to mandatory federal and state regulatory schemes, must be affixed by the manufacturer to any motor vehicle that will operate in the United States. The source of current federal regulation is the Federal Motor Vehicle Safety Standard No. 115, which became effective January 1, 1969, and which is now contained in 49 C.F.R. § 571.115. *See* N.Y. Veh. & Traf. Law § 431 (McKinney 1984). In vehicles manufactured before 1981, the VIN consists of 13 coded numerals and letters; starting with automobiles manufactured in 1981, the VIN consists of 17 numerals and letters.

The purpose of the VIN is to serve as a reliable and positive means by which to identify a particular motor vehicle. In coded form, the VIN will contain considerable information about the vehicle it is to be affixed to, including the manufacturer, make, model, body type, engine type, country of manufacture, the plant of manufacture, and the year of production. The final six digits of the VIN reflect the production sequence number of the specific vehicle. In all passenger vehicles produced during 1969 or later, the metal VIN plate must appear in open view on the left side of the top of the dashboard, and must be viewable through the windshield:

> The VIN for passenger cars . . . shall be located inside the passenger compartment. It shall be readable, without moving any part of the vehicle, through the vehicle glazing under daylight lighting by an observer having 20/20 vision (Snellen) whose eye point is located outside the vehicle adjacent to the left windshield pillar. Each character in the VIN subject to this paragraph shall have a minimum height of 4 mm.

49 CFR § 571.115(S 4.6).

This is generally referred to as the "public" VIN, or PVIN. In older models the "public" VIN plate was usually affixed to the door jamb for the driver's-side front door. Additionally, in most pre- and post-1969 vehicles, the "public" VIN can be located, additionally, under the hood, on the engine, where it is engraved.

Beyond the "public" VIN, all vehicles carry a matching "confidential" VIN (CVIN), which is hidden in some obscure portion of the vehicle, the position of which is usually known only by the manufacturer and law enforcement authorities. It is this confidential VIN which is used to deal with the problem of illegally transferred or altered VIN plates. By comparing the "public" VIN with the "confidential" VIN, an inspector will know whether a particular VIN plate belongs to the car to which it is currently affixed.

at the VIN plate that he now knew would be found on the dashboard, in a location that should have allowed for easy viewing from without. However, Officer McNamee found that the VIN plate was hidden by a piece of loose paper. Accordingly, he merely reached through the open door of the autmobile into the passenger compartment for the sole purpose of moving aside the offending scrap of paper and, in doing so, happened to look down at the vehicle's floor, where he noticed the butt of a loaded revolver protruding from underneath the driver's seat. This weapon, found in plain view, then served as the basis for respondent's felonious weapon's possession conviction.

The New York Court of Appeals, however, reversed this conviction, ruling that Officer McNamee had violated respondent's Fourth Amendment rights by opening the automobile's door and then reaching within to expose the paper-covered VIN plate, because the officer conducted an illegal "search" of the vehicle's interior absent probable cause or reasonable suspicion to believe that the car was stolen, or that any other serious criminal wrongdoing was afoot. This unsound ruling should not be allowed to stand, for, without furthering or protecting any meaningful privacy interest guarded by the Fourth Amendment, the New York Court of Appeals has adversely and substantially interfered with legitimate law enforcement and societal concerns by its severe curtailment of the scope of the generally innocuous, but certainly important, police activity which may attend the routine roadside stop for a traffic violation.

The lawfulness of the police action taken here may be founded upon a number of different, although not necessarily mutually exclusive, bases. First, the New York Court of Appeals' entirely flawed constitutional analysis was skewed from the outset, we believe, by the erroneous assumption that what occurred here was a "search" within the meaning of the Fourth Amendment. No "search" took place because respondent lacked any justifiable or reasonable expectations of privacy with respect

to the information contained on the VIN plate itself, the common areas of the automobile which were exposed to the police officer's view by the opening of the car door, or that space within the passenger compartment through which Officer McNamee's hand passed as he reached inside, over the top of the dashboard, to remove the piece of paper covering the VIN. But, even if it can be said that a "search" was conducted, then certainly it was one that was reasonable and, therefore, permissible under the Fourth Amendment, in light of the very limited and minimal nature of the additional, incremental intrusion following this lawful traffic stop, as balanced against the considerable importance of obtaining the information sought.

Then, there is respondent's status as an unlicensed operator. Although the New York Court of Appeals judged this factor to be of no moment, we believe it to be a matter of considerable significance. For, surely, once an unlicensed driver is discovered pursuant to a lawful traffic stop, he cannot harbor any legitimate expectation of privacy that could serve to bar a police officer's entry into the interior of the automobile that had been unlawfully operated. To the contrary, the unlicensed operator must be seen as retaining, at best, a diminished expectation of privacy with respect to the interior of his automobile. In the situation of an unlicensed driver, it is critical that the police take steps to assure that no further unlicensed operation of the automobile occurs. This will often necessarily entail police entry into the passenger compartment for the purpose of moving the vehicle off the roadway, securing the vehicle before removing the unlicensed driver from the scene, or performing those tasks related to the impoundment or towing of the vehicle, perhaps including an inventory search of the entire automobile. Thus, because respondent was an unlicensed operator, the opening of his car door and entry into the vehicle by a police officer should not have been subject to challenge.

Finally, we believe that the Court may, on the uncontested facts before it, now decide the important question

expressly left open by its decision in *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1211, n.1 (1983): whether, in the context of a routine stop for a traffic violation, "if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may nevertheless conduct a search as broad as those authorized by [*New York* v.] *Belton* [453 U.S. 454 (1981)] and [*United States* v.] *Ross* [456 U.S. 798 (1982)]?" Common sense, as well as the "legitimate and weighty" concern for the safety of police officers engaged in roadside traffic stops (*Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 [1977]), compel the conclusion that the question should be answered in the affirmative. A police officer who has the lawful predicate—and therefore the absolute right—to effect a full, summary arrest for a traffic violation should not be denied the full measure of safety he would have been afforded had he immediately consummated the arrest, simply because he decides instead to exercise restraint and conduct a preliminary investigation with an eye toward issuing a traffic ticket to the driver and allowing him to proceed on his way, unless something develops during the course of the brief roadside investigation which demands the more intrusive, full-blown arrest. Indeed, it must be recognized that during this investigative period it is the detained but unarrested, unhandcuffed driver who poses the greatest potential threat to the police officer's safety. Accordingly, this Court should rule that Officer McNamee would have been justified in searching for and seizing respondent's loaded pistol from the easily reachable area underneath respondent's seat, and that the police officer's actual discovery of the weapon by means of a much less intrusive course of conduct was, therefore, unobjectionable.

A. In the context of a lawful, routine stop for a traffic infraction, the police officer's act of opening the driver-side door of the automobile, and his reaching within to move a scrap of paper blocking his inspection of the VIN, otherwise viewable through the windshield, was not a "search" within the meaning of the Fourth Amendment.

The question of whether a routine VIN inspection constitutes a "search" under the Fourth Amendment has been the subject of extensive litigation. The New York Court of Appeals' untenable ruling that Officer McNamee violated the Fourth Amendment by conducting an illegal "search" of the automobile when he engaged in his minimally intrusive attempt to perform a routine visual inspection of the VIN, following the lawful stop of the vehicle for a traffic infraction, reflects a minority view which conflicts with the weight of lower court authority considering the issue of VIN inspections. Most of the federal courts of appeal and state appellate courts addressing the issue have reached the contrary conclusion that VIN inspections, even those involving an opening of the door or the lifting of the hood, are not "searches" within the meaning of the Fourth Amendment. *See, e.g. United States* v. *Forrest,* 620 F.2d 446, 454-455 (5th Cir. 1980) (opening of door to inspect VIN not a search); *United States* v. *Duckett,* 583 F.2d 1309, 1312-13 (5th Cir. 1978) (opening of door and police officer's leaning inside to inspect VIN not a search); *United States* v. *Wood,* 500 F.2d 681, 682-683 (5th Cir. 1974) (removal of grease and dirt obscuring VIN on truck not a search); *United States* v. *Polk,* 433 F.2d 644, 646-647 (5th Cir. 1970) (opening of door and lifting of hood to inspect VIN not a search); *United States* v. *Johnson,* 431 F.2d 441 (5th Cir. 1970) (en banc) (opening of door and inspection of frame for public and confidential VINs not a search); *United States* v. *Graham,* 391 F.2d 439, 443 (6th Cir.), *cert. denied,* 393 U.S. 941 (1968) (opening of car door to inspect VIN not a search); *United States* v. *Ware,* 457 F.2d 828, 829 (7th Cir.), *cert. denied,* 409 U.S. 888 (1972) (opening of car door

and examination of frame to inspect public and confidential VINs not a search); *Cotton* v. *United States*, 371 F.2d 385, 393 (9th Cir. 1967) (opening of door to inspect VIN not a search); *United States* v. *Kitowski*, 729 F.2d 1418, 1421 (11th Cir. 1984) (opening of door to inspect VIN not a search); *State* v. *Sedacca*, 252 Md. 207, 249 A.2d 456, 457 (Md. App. 1969) (opening of door to inspect VIN not a search); *People* v. *Brewer*, 112 Mich. App. 670, 317 N.W.2d 218, 219 (Mich. App. 1981) (opening of door to inspect VIN not a search); *People* v. *Valoppi*, 61 Mich. App. 470, 233 N.W.2d 41, 45-46 (Mich. App. 1975) (inspection of confidential VIN not a search); *Wood* v. *State*, 632 S.W.2d 734, 741 (Texas Cr. App. 1982) (police entry into car and opening of hood to inspect VIN not a search); *see, also, United States* v. *Zemke*, 457 F.2d 110 (7th Cir.), *cert. denied*, 406 U.S. 947 (1972) (inspection of confidential VIN under motorcycle crankcase not a search); *People* v. *Brooks*, 405 Mich. 225, 274 N.W.2d 430, 434-435 (Mich. 1979) (inspection of confidential VIN on engine and frame, conducted by crawling under vehicle, not a search); *Shirley* v. *Commonwealth*, 218 Va. 49, 235 S.E.2d 432, 433-436 (Va. 1977) (implying inspection of VIN not a search); *State* v. *Cohn*, 284 So.2d 426, 427 (Fla. App. 1973) (alternatively holding that opening of locked car door with wire hanger to inspect VIN was not a search); *but cf. United States* v. *Powers*, 439 F.2d 373, 374-376 (4th Cir. 1971), *cert. denied*, 402 U.S. 1011 (VIN inspection a search made lawful by "a legitimate reason to identify a motor vehicle"); *Simpson* v. *United States*, 346 F.2d 291 (10th Cir. 1965) (entry into vehicle to check VIN was an unlawful search without warrant); *State* v. *Moore*, 66 Ha. 202, 659 P.2d 70 (Ha. 1983) (opening of hood for confidential VIN inspection constituted illegal search under Fourth Amendment and Hawaii Constitution); *State* v. *Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (N.H. 1984) (entry into car to examine confidential VIN on steering column was illegal search which violated New Hampshire Constitution—*accord: State* v. *McGann*, 124 N.H. 101, 467 A.2d 571, 573 [1983]); *State* v. *Simpson*, 95 Wash.2d 170, 622 P.2d 1199, 1208-10 (Wash. 1980) (inspection of hidden VIN on door of parked, locked truck was an illegal search);

People v. *Piper*, 101 Ill. App. 3d 296, 427 N.E.2d 1361, 1363-65 (Ill. App. 1981) (opening of door to inspect VIN was illegal search).

But more importantly, the New York Court of Appeals' declaration that a "search" took place here is squarely at odds with the long-accepted analytical approach utilized by this Court in determining what type of police action qualifies as a "search" within the meaning of the Fourth Amendment. The Court has frequently reiterated that such "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v. *Karo*, 468 U.S. ——, 82 L.Ed.2d 530, 539 (1984), quoting from *United States* v. *Jacobsen*, 466 U.S. ——, 80 L.Ed.2d 85, 94 (1984); *Oliver* v. *United States*, 466 U.S. ——, 80 L.Ed.2d 214, 223 (1984); *Illinois* v. *Andreas*, 463 U.S. 765, 77 L.Ed.2d 1003, 1010 (1983); *United States* v. *Knotts*, 460 U.S. 276, 75 L.Ed.2d 55, 61-62 (1983); *Smith* v. *Maryland*, 442 U.S. 735, 739-741 (1979); *see Rakas* v. *Illinois*, 439 U.S. 128, 143-144, n.12 (1978). A subjective expectation of privacy, although relevant, will not alone suffice; the privacy expectation must be "justifiable" or "legitimate," meaning, of course, that the individual's subjective expectation of privacy is "one that society is prepared to accept as 'reasonable'." *Smith* v. *Maryland*, 442 U.S. at 740, *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see Oliver* v. *United States*, *supra* (marijuana cultivators could not create "legitimate" expectation of privacy in their "open fields" by building fences and posting "no trespassing" signs).

Because of the very special nature and purpose of the VIN, under no circumstances could respondent harbor a legitimate expectation of privacy related to the VIN plate affixed to the dashboard, or the information it contained. Indeed, since that VIN would ordinarily be subject to a "plain view" inspection by any and all from outside the vehicle, had respondent not intentionally or negligently allowed the VIN to become obscured by that mischievous

scrap of paper, this "search" case would not be before the Court today. *See Texas* v. *Brown*, 460 U.S. 730, 75 L.Ed.2d 502, 512-513 (1983); *see Walter* v. *United States*, 447 U.S. 649, 663-664 (1980) (Blackmun, J., dissenting). For no court has questioned the right of the police to inspect a VIN and take note of the information contained thereon when accomplished by the simple act of peering through the vehicle's windshield. *See, e.g., United States* v. *Brown*, 535 F.2d 424, 428 (8th Cir. 1976); *United States* v. *Wagner*, 497 F.2d 249, 252 (10th Cir. 1974); *Shaw* v. *State*, 253 Ga. 382, 320 S.E.2d 371 (Ga. 1984) *cert. denied*, —— U.S. ——, 84 L.Ed.2d 331 (1985); *State* v. *Simpson*, 622 P.2d at 1209, *supra*. Nor could respondent fabricate a "legitimate" expectation of privacy concerning this VIN plate by permitting it to become hidden under a piece of paper. *See Oliver* v. *United States*, *supra*. Indeed, even if this particular VIN plate had been located on the driver-side door jamb as Officer McNamee originally assumed, thereby requiring an opening of the door to allow an inspection, no greater legitimate expectation of privacy would have been extant, since even that placement of the VIN would be designed to accomplish easy accessibility and viewability.*

As this Court recently made clear in *California* v. *Carney*, —— U.S. ——, 53 U.S.L.W. 4521, 4523 (1985), the

* Petitioner does not address the question of whether the opening of a hood from the outside of the vehicle would constitute a search. The New York Court of Appeals did not expressly decide this issue, limiting its decision to the question of whether the opening of a car door and the non-consensual entry into the passenger compartment of respondent's vehicle was a search. It is hard to imagine, however, that a person might have a legitimate and reasonable expectation of privacy with respect to a VIN mounted on the engine block. Certainly, personal possessions or other valuables are unlikely to be either stored or secreted under a hood. The only person likely to deal with the motor area is a mechanic or garageman. Nevertheless, at least one court has declared an inspection of a VIN located on the motor, under the hood, to be an illegal search. *See State* v. *Moore*, 66 Ha. 202, 659 P.2d 70 (Ha. 1983).

Presumably the New York Court of Appeals' decision would prohibit a sub-hood VIN inspection where the police officer would first have to enter the passenger compartment to undo a hood latch from within, as is common with newer cars. Any such action taken by the police officer would be governed by the analysis of the instant case.

long-recognized reduced expectation of privacy which serves to distinguish automobiles from homes in Fourth Amendment analysis (*see, e.g., South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 [1976]; *Cardwell* v. *Lewis*, 417 U.S. 583, 590 [1974]), emerges not so much from the relatively non-private configuration of the vehicle (*see Cardwell* v. *Lewis, supra*), but "from the pervasive regulation of vehicles capable of traveling on the public highways . . . . The public is fully aware that it is accorded less privacy in its automobile because of this compelling governmental need for regulation." 53 U.S.L.W. at 4523. At the core of this regulatory process is the VIN. Because there are so many automobiles of the same make and color, and in view of the easy availability of paint jobs and the quick transferability of license plates,* the VIN exists as the only effective means for achieving the positive identification of a particular automobile.

The VIN may be analogized to a person's fingerprints. Its sole purpose is to proclaim the true "identity" of a particular vehicle. The same VIN may not be issued to two automobiles manufactured within the same 30-year period (49 CFR § 571.115 [S4.4]), a lengthier span of time than the normal life of almost every car on the road today. Although the "public" VIN, most often found on the dashboard but sometimes on the door frame, may be removed with considerable difficulty, or subjected to alteration, the "confidential" VIN, the location of which is generally known only to the manufacturer and law enforcement authorities, will be indelibly etched somewhere on a major component of the vehicle, like the chassis, the steering column, or the engine block.

It is because of this guarantee of positive identification that the VIN is used as the primary means for vehicle iden-

* *See United States* v. *Williams*, 434 F.2d 681, 683 (5th Cir. 1970) *cert. denied*, 401 U.S. 1011 (1971); *Shirley* v. *Commonwealth*, 235 S.E.2d at 434, *supra*. According to the 1984 New York Statewide Police Information Network, Year End Report, p. 1305, there were 29,062 cases of stolen license plates.

tification in almost every aspect of that "pervasive" regulatory scheme.* Hence, the automobile's registration certificate, which in New York also contains proof of a proper annual safety inspection, and which must be displayed to the police following a stop for a traffic infraction (N.Y. Veh. & Traf. Law § 401 [McKinney 1984]) prominently sets forth the VIN. It is by comparing the registration certificate to the VIN that a police officer will learn whether a vehicle he has stopped is properly registered. Of course, the VIN also serves as a valuable tool in the war against car theft, a national problem of major proportion, as the VIN will quickly help a police officer determine whether a vehicle is lawfully possessed by a driver. A stolen car's VIN is entered into the nation-wide computerized National Crime Information Center (NCIC) which provides police with information that a car has been stolen anywhere in the country.

Furthermore, a separate card showing proof of adequate liability insurance coverage is required to be carried in a vehicle. It must, in addition to the registration, be displayed to police officers when a driver is stopped for a routine traffic infraction (*see* N.Y. Veh. & Traf. Law § 312[1][b] [McKinney 1984]), or to other drivers when a person is involved in a traffic accident (*see* N.Y. Veh. & Traf. Law § 318 [12][a] [McKinney 1984]). This card, too, relies on the automobile's VIN as the primary basis for positively establishing that a particular vehicle is properly insured.

Additionally, the VIN plays a major role in aspects of this pervasive regulatory scheme which are somewhat more removed from the context of the highway traffic stop. One of the important purposes behind the federal regulatory

* The numbers of license plates, affixed to the exterior of the vehicle and with respect to which there is no reasonable expectation of privacy (*see United States* v. *Hensel*, 699 F.2d 18, 31-32 [1st Cir.], *cert. denied*, 461 U.S. 958, [1983]), are used for the regulatory scheme as well, appearing on registration certificates and insurance cards. But, as noted, they may be stolen or transferred easily with the quick twist of a screwdriver.

requirement that an automobile's VIN be easily viewable through the windshield, in addition to the general law enforcement need "to simplify vehicle information retrieval," is "to reduce the incidence of accidents by increasing the accuracy and efficiency of vehicle recall campaigns." 49 C.F.R. § 571.115 (S1). The VIN is also essential to the routine transfer of title, and matters such as the recording of a security interest in a vehicle after a bank has loaned money to some person making the purchase of a car possible.

From all of this it is evident that the individual driver can have no legitimate expectation of privacy in the VIN plate that has been affixed to his car. It has been placed there by the automobile manufacturer, under federal regulatory mandate, not because the buyer of the car would desire to have it as part of his purchase, but because compelling societal and governmental interests demand that automobiles carry some permanent, easily verifiable, and unique form of positive identification in order to assure compliance with the multitude of regulatory policies that are in effect, and to both deter and detect automobile theft. Simply stated, the VIN plate is affixed to the dashboard so that the police officer, and anyone else, can look at it. Alteration or removal of the VIN, even by the owner of the car, normally constitutes a crime. *See* N.Y. Penal Law § 170.65 (McKinney 1984).

Even the New York Court of Appeals seemed to accept the validity of the unremarkable proposition that there is no "legitimate expectation of privacy in the VIN itself . . . ." (A. 58). The court, however, expressed its concern that "the existence of a VIN on every automobile cannot enable police, without any basis, to make 'wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen' (1 W. LaFave, Search and Seizure, § 2.5, p. 360)" (A. 58). In making this statement, the Court of Appeals showed that it had missed the point of petitioner's arguments.

Petitioner does not dispute that, despite the importance of the regulatory scheme, vehicles proceeding along the highways cannot be arbitrarily stopped solely for the purpose of allowing the police to inspect the VIN. But this is no novel proposition, as the Court has already expressed this opinion quite clearly in *Delaware* v. *Prouse*, 440 U.S. 648. Petitioner does contend, however, that once a vehicle has been lawfully prevented from proceeding on its way because of some unlawful operation of the vehicle, that predicate alone may properly trigger a document examination (*see Delaware* v. *Prouse*, 440 U.S. at 659) and the policeman's routine inspection of a VIN plate to assure compliance with the pervasive regulatory scheme, even if, as here, it necessitates the opening of an automobile's door to do so. Thus, it is not arbitrary or unfettered police discretion which sets the VIN inspection in motion, but rather the actions of the motorist in breaking the rules of the road. A police officer must have the right to identify positively not only the driver who has committed the traffic infraction, but the vehicle involved. Otherwise, it would render all of the legitimate regulatory interests nugatory. The driver's display of the automobile's registration certificate alone will not suffice, because although possession of that document will usually constitute a *prima facie* indication that the automobile is lawfully possessed by the driver, without comparing the registration against the VIN plate there is no way of knowing for sure that the registration certificate is for that particular car.* Furthermore, the important question of adequate liability insurance coverage cannot be definitively resolved without a comparison between the in-

* In a nation where car theft is an epidemic (in New York alone, there were more than 650,000 stolen cars reported between 1979 and 1983—Source: State of New York, Division of Criminal Justice Services, Uniform Crime Reporting Statistics, 1979-1983, p. 15), surely the best interests of society are served by the swift detection of whether a car stopped during a traffic stop has been stolen. Indeed, the car thief possessing a stolen car lacks any "reasonable expectation of privacy" which might serve as a grounds for challenging a police search of the automobile, or a VIN inspection. *See Rakas* v. *Illinois*, 439 U.S. 128, 141 n.9 (1978).

formation contained on the insurance card and the automobile's VIN.*

Against these weighty governmental and societal interests served by the VIN, the individual sacrifices few, if any, justifiable personal privacy interests by the inspection of the VIN, even an inspection that is accomplished by the opening of the car door. The New York Court of Appeals erroneously concluded that a "search" occurred because Officer McNamee's opening of the door and his reaching within to move the paper on the dashboard exposed "hidden areas" of the automobile (A. 57). Preliminarily, the New York Court of Appeals' use of the term "hidden areas" is somewhat misleading. Although Officer McNamee first noticed the butt of respondent's pistol when the officer reached into the car through the open door, his testimony is unequivocal in establishing that the handle was sticking out "from the driver's seat underneath" (A. 21), by "approximately an inch" (A. 26). In actuality, therefore, the gun butt may well have been viewable from outside the automobile by an officer or anyone else looking through the side windows toward a point on the floor of the vehicle near where the driver's feet would be located. Certainly, at no time did Officer McNamee look under the driver's seat into one of the very truly "hidden areas" of the relatively exposed automobile interior. *See Cardwell* v. *Lewis*, 417 U.S. at 590, *supra*.

Furthermore, the New York Court of Appeals failed to consider that there may be many different situations during the course of a routine stop for a traffic infraction when police officers might be legitimately, indeed necessarily, called upon to open the automobile's door and physically enter the vehicle. For example, if the driver chooses to leave his vehicle upon being pulled over and then approaches the police car, an officer who walks back to look

* Surely, the societal importance of enforcing a program of sufficient liability insurance coverage cannot be overstated, in view of the tens of thousands of highway fatalities and highway injuries suffered annually by the citizens of this country.

at the vehicle must be free to enter it and turn off the ignition if the car has been left running. *See, e.g., Jackson* v. *Superior Court,* 142 Cal. Rptr. 299, 74 Cal. App. 3d 361 (Cal. App. 1977). Or, if the vehicle constitutes a potential hazard to other vehicular traffic, the officer surely must be allowed to enter the vehicle for the purpose of turning on the emergency rear and front warning flashers. If the car has been stopped on an incline, the officer may understandably find it appropriate to assure that the parking or emergency brake is engaged, or that the wheels are turned into the curb. In the case of an unlicensed driver, as respondent was here, or an intoxicated driver, the police may find it absolutely necessary to enter the vehicle to drive it from the public thoroughfare where it might constitute a hazard or at least ready it for towing. Manifestly, none of these innocuous acts can be considered a "search" within the meaning of the Fourth Amendment, even though they may entail the opening of the door and some degree of police entry into the automobile's interior, thereby exposing the same areas of the passenger compartment that were exposed to easier viewing by Officer McNamee's minimally intrusive conduct here. *See Harris* v. *United States,* 390 U.S. 234, 236 (1968) (the discovery of a registration certificate belonging to the victim of robbery, due to the opening of a car door by a police officer, "was not the result of a search of the car, but a measure taken to protect the car while it was in police custody").

As support for its erroneous conclusion that this was a search, the New York Court of Appeals pointed to the fact that when Officer McNamee initially opened the car door, and subsequently reached within to expose the dashboard VIN, he was seeking "information." But, as we have shown, there existed absolutely no legitimate expectation of privacy with respect to the information he wished to obtain —the automobile's VIN—and, therefore, this quest for "information" could not have created a "search" where none would have otherwise existed.

Indeed, this case presents the Court with an opportunity to make clear that, apart from the consideration of privacy

interests, a VIN inspection does not constitute a "search" of an automobile because this inquiry does not ordinarily involve an attempt to find and seize physical evidence of a crime or contraband, the usual targets of an investigative "seach." *Cf. Cady* v. *Dombrowski*, 413 U.S. at 442, n. Nor was there any rummaging through truly hidden areas of the vehicle such as the space beneath the front seats, the glove compartment, or the trunk, where private or personal items might have conceivably been secreted. The only "information" sought here was that which the officer had a right to know, and his limited entry into the vehicle to expose an area of the automobile for which there could never be a legitimate expectation of privacy—the top of the dashboard —should not be categorized as a search even if it engendered a slightly greater, incidental exposure of a common area of the interior close to where a person's foot would ordinarily rest.

To be sure, the illogical nature of the result reached by the New York Court of Appeals is underscored by its suggestion that no search, and no intrusion on respondent's privacy interests, would have occurred if the police officers had required respondent to return to his car to open the door of his vehicle and personally remove the piece of paper hiding the VIN (A. 60). Yet the same area of floor space would have been exposed to police view by this action and, considering the well-known potential safety threat to police officers attending any traffic stop (*see Pennsylvania* v. *Mimms*, 434 U.S. 106 [1977]), it must be assumed that the officers' eyes would have been keenly trained on every "reachable" area of the vehicle's interior while respondent was performing this act of self-help. Hence, they would have certainly observed the protruding gun butt.

This suggestion by the New York Court of Appeals that a driver must be allowed to return to his car to expose a covered VIN is inconsistent with the Court's ruling in *Pennsylvania* v. *Mimms, supra*. There, it was held that a police officer, in the context of a lawful routine traffic stop,

as a matter of self-protection, may always require the driver to emerge from the vehicle. If this is so, surely the Fourth Amendment does not require that the driver then be allowed to re-enter the vehicle once the police have manifested a desire to conduct a thorough VIN inspection. If such were the case, drivers who are, in fact, armed and dangerous and who have something to hide, would be invited to take some desperate measure against the police. Unjustifiably, the sound rule of *Mimms* would be substantially undercut. Indeed, in this very case, had the police been subject to the rule announced by the New York Court of Appeals, Officers Meyer and McNamee would have been required to send respondent back into a car where a loaded pistol within easy reach lay ready for use.

Accordingly, the Court should hold that the minimally intrusive act of opening a car door and then reaching into the passenger compartment of the automobile for the very limited purpose of making possible the visual inspection of the VIN, during the course of a lawful stop for a routine traffic infraction, impinged on no legitimate or reasonable expectation of privacy and, therefore, was not a "search" as that term relates to the Fourth Amendment.

B. If the mere opening of the automobile's front door and the police officer's limited entry into the interior of the passenger compartment for the sole purpose of exposing the dashboard VIN to visual inspection constituted a "search," it was a patently reasonable "search" satisfying the requirements of the Fourth Amendment.

Even were one to accept the New York Court of Appeals' finding that the police officers' actions amounted to a "search" of the vehicle, its ultimate announcement that the search was violative of the Fourth Amendment because it was unsupported by probable cause or reasonable suspicion to believe that a more serious crime, independent of the observed traffic infractions, was involved, could not be

sustained. If, following the lawful traffic stop, Officer McNamee's minimally intrusive act of opening the car door and then reaching into the passenger compartment for the sole purpose of moving the paper which obstructed the dashboard VIN, was, indeed, a "search" because of the incidental exposure of certain areas near the floor of the vehicle, then under all of the facts and circumstances present the search was surely "reasonable" and, thus, in full compliance with the Fourth Amendment. *See Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1217-18 (1983) [*quoting Terry* v. *Ohio*, 392 U.S. 1, 21 (1967)]; *compare United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (in assessing the reasonableness of the seizure of a vehicle at a fixed checkpoint, the Court stated that "[t]he Fourth Amendment imposes no irreducible requirement of . . . [individualized] suspicion").

1. The New York Court of Appeals' incorrect ruling flows from its erroneous choice to parse out and segregate the various circumstances and stages of this evolving police-citizen encounter, leading it to assume, quite wrongly, that the initial proper stop of the vehicle for two observed traffic infractions was largely irrelevant to the determination of whether the police could then lawfully conduct a limited entry into the vehicle to inspect the VIN. This fundamental defect in the Court's analysis is quite similar to one considered and corrected by this Court in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). In *Mimms*, the Pennsylvania Supreme Court found a Fourth Amendment violation in a police officer's directive to a driver lawfully stopped for a traffic infraction to emerge from his vehicle. Once the driver complied, the police officer noticed a "bulge" in the driver's jacket which a pat down revealed to be a pistol. The Pennsylvania Supreme Court determined that, although the original stopping of the vehicle was lawful, the order to emerge was an "impermissible seizure . . . . because the officer could not point to 'objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety'." 434 U.S. at 107-108.

This Court reversed, finding the police action taken there, even without any "reason to suspect foul play from the particular driver at the time of the stop," was nevertheless reasonable and, therefore, permissible under the Fourth Amendment. 434 U.S. at 109. In making the determination of reasonableness, the Court noted that the "inquiry must . . . focus . . . on the *incremental intrusion* resulting from the request to get out of the car *once the vehicle was lawfully stopped.*" *Id.* (emphasis added). Balanced against the legitimate, general concern for police safety, the Court had no difficulty in concluding that

> This additional intrusion can only be described as *de minimus.* The driver is being asked to expose very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a 'serious intrusion upon the sanctity of the person,' but it hardly rises to the level of a 'petty indignity'."

434 U.S. at 113.

The analogy to be drawn between *Mimms* and the present case should have been readily apparent to the New York Court of Appeals. True, in *Mimms* the Court was concerned about the limited further "seizure" of a person, and here we are dealing with the additionally incremental "search" of an automobile. But, of course, the respect for the physical integrity of the person must exceed that accorded a vehicle, and even in *Mimms* the Court justified the minimal additional intrusion upon the person of the driver by noting that he was "being asked to expose to view very little more of his person than is already exposed," thus factoring "search" concerns into the analysis. Furthermore, here we are dealing with a "search" which exposed "to view very little more" of the car's interior than was already subject to "non-search" scrutiny from outside the

vehicle. *See Texas* v. *Brown*, 460 U.S. 730, 75 L.Ed.2d 502, 512-513 (1983). Indeed, in actuality the police instruction to emerge from the car in *Mimms*, which required an attendant opening of the vehicle's door, served to expose as much of the interior of the automobile as was revealed by the police action in this case. Unlike *Mimms*, however, here the police did not even have to direct respondent to leave the automobile, as he had already done so of his own volition.

While in *Mimms* the Court was dealing with the important societal concern for police safety and here the governmental and societal interests are primarily related to the overwhelming problem of car theft and the effective enforcement of a "pervasive" automobile regulatory scheme, the fact remains that in both cases the competing privacy interests extending beyond those of the initial stop are of a minimal, inconsequential sort. Indeed, aside from the minor factors differentiating the two cases, in the end, the minimal intrusion caused by the direction to emerge in *Mimms* and the limited entry and search carried out by the police officer here are really flip sides of the same analytical coin. In both instances, the negligible incremental intrusions following the concededly lawful traffic stops gave rise, in the two state appellate courts, to much ado about nothing.

2. Quite apart from *Mimms*, in reviewing the totality of what occurred here, one must conclude that the police conduct was, throughout, perfectly reasonable. The police officers initially interfered with respondent's freedom of movement through the streets of New York City only because he invited that interference by operating the vehicle at an excessive rate of speed, and with an unsafe broken windshield. *See* N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984); *cf. Delaware* v. *Prouse*, 440 U.S. at 650. Then, the registration certificate and insurance card which respondent gave to Officer Meyer at the police car indicated that the automobile in question was owned by someone else, later learned to be respondent's brother-in-law (A. 32), a

fact that could not be known for certain at the scene of the stop. Finally, respondent revealed that he was an unlicensed driver.

In rejecting the right of the police to open the door to respondent's car for the purpose of checking the VIN, the New York Court of Appeals refused to impute Officer Meyer's knowledge about the different owner of the vehicle, and respondent's status as an unlicensed operator, to Officer McNamee, who had begun to approach respondent's vehicle before this additional information was disclosed (A. 15, 21). The New York Court of Appeals should have attributed this information known by one member of a police team present at the scene of this roadside encounter to his brother officer, notwithstanding the absence of a communication between the two officers, for a citizen has a right to be free from unreasonable searches conducted by the "State" as a whole (U.S. Amend. 4; Amend. 14), and not individual police officers. Hence, the collective knowledge of all the state agents present at the scene of a police-citizen encounter should be the determining factor with respect to the reasonableness of the official action taken. *United States* v. *Ragsdale*, 470 F.2d 24, 29-30 (5th Cir. 1972); *see also, United States* v. *Stratton*, 453 F.2d 36, 37-38 (8th Cir.), *cert. denied*, 405 U.S. 1069 (1972).

Further support for this proposition is to be found in the Court's recent decision of *United States* v. *Hensley*, —— U.S. ——, 83 L.Ed.2d 604, 612-615 (1985), where it was held that police officers of one jurisdiction could conduct a warrantless *Terry* stop of a suspect based on a flyer request by police officers from another jurisdiction, who possessed reasonable suspicion justifying the stop. While it is true that in *Hensley* there was an officially communicated request between the two police agencies, and here Officer Meyer did not call out the additional information he had learned to Officer McNamee, nor did he ask Officer McNamee to inspect the VIN, such a communication should not be the *sine qua non* for imputing the collective facts to each officer at the scene. Indeed, Officer Meyer, an experienced police

officer who surely had participated in routine traffic stops many times before, and who observed Officer McNamee standing at respondent's car, may well have assumed that a routine inspection of the VIN would ensue without the need for a request.

While the totality of all this information did not necessarily create a reasonable suspicion that the vehicle was stolen, it certainly offered the police a legitimate reason to inspect the VIN.

3. Yet even if the additional pieces of information known to Officer Meyer were not to be credited to Officer McNamee, his decision to inspect the VIN, following the lawful stop for the traffic infractions he personally observed, and the "search" which then occurred, was nonetheless valid. That the "search" lacked probable cause or reasonable suspicion beyond the uncontested probable cause which warranted the initial seizure of the vehicle in the first instance matters not. The "search" of the car to expose the VIN related directly to the law enforcement function and regulatory policies properly being carried out due to respondent's commission of the traffic infractions. Whatever additional minimal privacy intrusion resulted from the "search" was justified and offset by the reduced expectation of privacy that one has in an automobile, and the legitimate governmental and societal need for enforcement of its important regulatory policies. *See California* v. *Carney*, —— U.S. ——, 53 U.S.L.W. 4521, 4523 (1985).

Significantly, the search here was not a rummaging search of private areas and closed containers for contraband or evidence which might require independent probable cause (*see United States* v. *Ross*, 456 U.S. 798 [1982]) or the threshold predicate of a full-blown arrest (*see New York* v. *Belton*, 453 U.S. 454 [1981]; *but see* Argument, Subpoint D, pp. 39-50, *infra*). Nor was this an intrusive *Terry*-type protective "frisk" of private areas of the automobile, which might require a reasonable suspicion that the ve-

hicle's occupants are armed (*see Michigan* v. *Long*, 77 L.Ed.2d 1201). This "search" was nothing more than a door opening followed by a brief physical entry consisting of the placing of a hand into the exposed areas of the car, which at worst had an incidental effect of presenting to police view a few locations near the floor of the car which might have otherwise remained unseen.

This "search" relating directly and exclusively to an examination of the VIN may be likened to the type of warrantless administrative inspection searches requiring no probable cause or reasonable suspicion which have been sustained by this Court in cases such as *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *United States* v. *Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). *Compare United States* v. *Martinez-Fuerte*, 428 U.S. at 560-561. Because of the "pervasive" federal regulatory schemes applicable to the commercial enterprises involved in those cases, the extremely reduced expectations of privacy legitimately held by the subjects of the intrusion justified the warrantless and unsuspicioned searches. But automobiles too are known by the public to be the subject of "pervasive" federal and state regulation as well (*see California* v. *Carney*, 53 U.S.L.W. at 4523), and thus the observed commission of two traffic infractions reasonably justified the limited, directed intrusion of an administrative-type inspection of the VIN, which included a very minimal "search" of the sort that occurred here.

Ultimately, during the course of that patently reasonable "search," the officer inadvertently observed the butt of respondent's pistol in what was most akin to "plain view," as it was extending out from under the driver's seat into the common area of the automobile. Hence, the resulting seizure of the pistol was clearly justified. *See Texas* v. *Brown*, 460 U.S. 730; *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

C. Once respondent was lawfully stopped for a traffic infraction, his status as an unlicensed driver deprived him of any legitimate and reasonable expectation of privacy with respect to the passenger compartment of the automobile that might have served to prohibit a policeman's non-consensual entry.*

The decision of the New York Court of Appeals that respondent's Fourth Amendment rights were violated by the police officer's non-consensual opening of the automobile

* Although the arguments presented in subpoints C and D were not advanced below as a justification for the search of petitioner's vehicle, it is well settled that litigants before this Court may raise new or alternative theories in support of a federal issue raised in state court. *See Illinois* v. *Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 554 (1983) (White, J., concurring) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below."); *Fuller* v. *Oregon*, 417 U.S. 40, 58 (1974) (The Court may adopt alternative theories from those raised in state courts provided the federal question is not rendered "substantially different."); *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972) (The Court's method of analysis may differ from that utilized by the lower court); *Raley* v. *Ohio*, 360 U.S. 423, 437 n.12 (1959) (arguments may vary from those raised below); *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."); *cf. Wilson* v. *Cook*, 327 U.S. 474, 483 (1946); *see also* R. Stern and E. Gressman *Supreme Court Practice* 230 (5th ed. 1978). Notwithstanding petitioner's newly advanced arguments, the essential question is unchanged from that raised in the lower courts and remains whether the police conduct was permissible under the Fourth Amendment. Only the method by which to analyze the lawfulness of that conduct has been altered. *See Scott* v. *United States*, 436 U.S. 128, 138 (1978) ("the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."). Thus, since these new arguments are derived from the question litigated below and have ample factual support in the record, there exists no impediment to this Court's consideration of them. *Cf. Illinois* v. *Gates*, *supra*, at 536-540 (The Court refused to entertain arguments advanced for a good faith exception to the exclusionary rule where the record was inadequate); *Steagald* v. *United States*, 451 U.S. 204, 210 n.5 (1981) (Court would not entertain a "standing" argument due to the inadequacy of the record on that issue).

door and "entry" into the passenger compartment (by reaching within), because it exposed "hidden areas" of the vehicle, is additionally untenable because of respondent's special status as an unlicensed driver. Regardless of what reasonable expectations of privacy might be asserted by the properly licensed driver as a bar to non-consensual police entry into the passenger compartment of a lawfully stopped vehicle, surely the unlicensed driver's reasonable expectations of privacy with respect to the passenger compartment, assuming the lawfulnesss of the initial stop, are substantially diminished. When dealing with an unlicensed driver, the police have not only the right but the obligation to assure that he does not re-enter the vehicle to operate it for even a moment longer.* Since licensing statutes exist to assure that drivers of motor vehicles are qualified to do so, persons operating vehicles without licenses must be presumed to be either unsafe or unqualified drivers. *See Delaware* v. *Prouse*, 440 U.S. 648, 659-660 (1979).

Concommitantly, the police officer will sometimes find it necessary to enter the vehicle either to move it personally from traffic, park it, or most frequently, to conduct an inventory search of the vehicle prior to its being towed from the roadway and impounded. *See, e.g., United States* v. *McCambridge*, 551 F.2d 865, 869-870 (1st Cir. 1977); *United States* v. *Griffin*, 729 F.2d 475, 480-481 (7th Cir.), *cert. denied* 83 L.Ed.2d 60 (1984); *United States* v. *Balanow*, 528 F.2d 923, 924 (7th Cir. 1976); *see also, South Dakota* v. *Opperman*, 428 U.S. 364, 369-372 (1976) (inventory search of impounded vehicle is reasonable under the Fourth Amendment).

Quite simply, as soon as respondent was lawfully pulled over for the traffic infractions he committed, he had to be aware that his status as an unlicensed driver would come to light, and that he would not be allowed to continue his opera-

* This argument concerning the unlicensed driver should apply with equal force to the situation involving the intoxicated driver, who is temporarily rendered unqualified to operate a motor vehicle by his drinking.

tion of the vehicle. He had to be charged with the reasonable expectation that there would be some degree of police intrusion into the interior of the automobile, occasioned at the very least by a police obligation to secure the vehicle against vandals who might damage the car after the officers removed respondent from the scene. That Officer McNamee was initially unaware of respondent's status as an unlicensed driver, and opened the door of the vehicle to inspect the VIN, is of no moment and in no way detracts from the ultimate conclusion that respondent had to know that the logical outcome of this police-citizen encounter would be a police entry into the vehicle. It was not the officer's knowledge but respondent's status as an unlicensed driver which served to reduce the expectations of privacy that he might reasonably maintain with respect to the interior of the vehicle.

As this Court has observed in a somewhat different context, an individual's "wrongful" presence on a premises deprives him of a "reasonable" expectation of privacy. *See Rakas* v. *Illinois*, 439 U.S. 128, 143-144 n.12 (1978); *Jones* v. *United States*, 362 U.S. 257, 267 (1960). The Court in *Rakas* considered it to be "inexplicabl[e]" that a few lower courts had allowed the possessor of a stolen car to contest the lawfulness of a police search of the automobile (439 U.S. at 141, n.9), and, indeed, the generally accepted rule is that a car thief, having the status of an unlawful, "wrongful" possessor of a vehicle, may have no reasonable expectation of privacy that would serve to bar a police search. *See, e.g., United States* v. *Hargrove*, 647 F.2d 411, 413 (4th Cir. 1981); *United States* v. *Pitts*, 588 F.2d 102, 103 (5th Cir.), *cert. denied*, 441 U.S. 948 (1979); *United States* v. *Hensel*, 672 F.2d 578 (6th Cir.), *cert. denied*, 457 U.S. 1107 (1982). Indeed, the Court of Appeals for the Second Circuit has extended this "wrongful" status concept even further by holding that an escaped prisoner has no reasonable expectation of privacy in an automobile being used by him to commit another crime, because his presence in free society is "wrongful." *United States* v. *Roy*, 734 F.2d 108,

110-111 2d Cir. 1984); *cf. Hudson* v. *Palmer*, 468 U.S. ——, 82 L.Ed.2d 393 (1984) (holding that an incarcerated prisoner has no reasonable expectation of privacy under the Fourth Amendment with respect to his prison cell).

Here, respondent was not a "wrongful" possessor of the vehicle he was driving in quite the same way that a thief might be. It would appear that the owner of the vehicle, respondent's brother-in-law (A. 32), had bestowed sufficient authority upon respondent for him to possess the car lawfully, in a general sense. Thus, if respondent had merely left the vehicle parked at a curb and used it as a repository for personal possessions that he kept in the trunk, in closed containers in the passenger compartment, or under the seats, it might well be that respondent could have been said to possess a reasonable expectation of privacy with respect to those items, thereby barring an unreasonable police search or seizure.

But when respondent chose to operate the vehicle unlawfully on the public highways, without a valid license, he assumed the status of "wrongful" operator, and his presence behind the steering wheel of this moving car was, indeed, a "wrongful" presence within those mobile "premises" as well. The police had to step in and assert their dominion and control over the vehicle to protect the general public from a presumptively unsafe driver.

That is not to say that respondent thereby relinquished every reasonable expectation of privacy that he had once possessed with respect to the car. Items kept in the trunk should not have been subject to police search, in the absence of a full inventory search attending an impoundment. The same might be said for closed containers within the passenger compartment.

However, to the extent that some "hidden areas" of the interior might now become observable because of a police entry into the vehicle, following a lawful traffic stop, it must

be concluded that respondent's reasonable expectations of privacy had been diminished to the point where he could no longer be allowed to complain of that entry. It would be illogical to expect that society would be willing to bar a limited police intrusion into the passenger area of a car that was stopped on the public roadway while being driven, in a dangerous manner by an unlicensed driver.

D. The search of respondent's vehicle incident to his seizure for a routine traffic violation was justified under *New York v. Belton*, 453 U.S. 454 (1981).*

Respondent's vehicle was stopped by police officers for the traffic violations of speeding and driving with a broken windshield. N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984). During the attempt to inspect the vehicle's VIN, one of the officers recovered a loaded weapon found protruding from underneath the driver's seat. We believe that the officer's recovery of that weapon was justified under this Court's decision in *New York* v. *Belton*, 453 U.S. 454 (1981), as a result of a search incident to the initial seizure. Although that seizure did not rise to the level of a formal arrest as in *New York* v. *Belton*, *supra*, this was merely fortuitous because the officers were authorized by New York law to arrest respondent for those traffic violations, and the subsequently revealed traffic violation of driving without a license (N.Y. Veh. & Traf. Law § 509) (McKinney 1984). N.Y. Crim. Proc. Law § 140.10(2) (McKinney 1984); N.Y. Veh. & Traf. Law § 155 (McKinney 1984). Thus, the instant case fairly presents the question left open by this Court in *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1210 n.1 (1983), i.e., whether ". . . if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may nevertheless conduct a search as broad as those authorized by *Belton*** and

* See note, p. 34, *ante*.

** *New York* v. *Belton*, 453 U.S. 454.

Ross.'"* Petitioner submits that the risks inherent in a routine traffic stop are greater where the traffic offender is neither handcuffed nor arrested. Because a policy of *not* immediately arresting all traffic offenders summarily should be encouraged, those police officers choosing not to effect a full arrest, where a summons might appear initially to be a reasonable alternative, must not be placed in any greater jeopardy than the officer who is quick to arrest. Therefore, the officer who hesitates to arrest should be permitted a limited protective search of the stopped vehicle's passenger compartment.

In determining whether a routine traffic stop would have justified the ensuing search of respondent's vehicle, our analysis must, of necessity, commence with the case of *New York* v. *Belton*, 453 U.S. 454. In that case, a vehicle was stopped for speeding and, upon approaching the stopped vehicle, the police officer smelled burning marijuana and simultaneously noticed a marijuana envelope on the floor of the vehicle. *Id.* at 455-456. After placing the occupants under arrest, the officer searched the passenger compartment, recovering a quantity of cocaine from the zippered pocket of a leather jacket on the back seat. *Id.* The search of the passenger compartment was upheld on the theory that it was contemporaneous with and incident to the driver's lawful arrest. *Id.* at 460. Relying on *Chimel* v. *California*, 395 U.S. 752, 763 (1969), this Court reasoned that since the passenger compartment was within the area into which a motorist might reach, its search incident to that motorist's arrest was necessary to preserve the safety of the officer and prevent the destruction of evidence. *New York* v. *Belton*, 453 U.S. at 457, 460-461.

Although the search at issue in *Belton* was incident to an arrest for marijuana possession, the holding of that case would apply with equal force to searches incident to arrests

* *United States* v. *Ross*, 456 U.S. 798 (1982).

for routine traffic offenses.* *See Michigan* v. *Long*, 77 L.Ed.2d at 1210 n.1 ["... if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York* v. *Belton*, 453 U.S. 454, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981) ..."] (dicta); *United States* v. *Robinson*, 414 U.S. 218 (1973); *Gustafson* v. *Florida*, 414 U.S. 260 (1973) (both authorizing searches of motorists incident to their arrests for failure to produce drivers' licenses); *United States* v. *Mechanik*, 735 F.2d 136, 140 (4th Cir. 1984) (*Belton* search incident to arrest for "several violations of traffic laws"); *United States* v. *Marquez*, 687 F.2d 328, 330-331 (10th Cir. 1982) (*Belton* search incident to arrest for broken tail light); *see also Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220 (1968) (leaving open the question of "[w]hether or not a car may constitutionally be searched 'incident' to arrest for a traffic offense ..."). The mere fact that searches incident to traffic arrests often lack an evidentiary justification is not determinative because

> [t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.

United States v. *Robinson*, 414 U.S. at 234; *Gustafson* v. *Florida*, 414 U.S. at 265. Certainly, the threat that a weapon might have been concealed in the passenger compartment exists irrespective of whether the arrest is based on marijuana possession, a traffic offense or some other

* Indeed, New York has chosen to punish certain traffic violations even more severely than simple, first offense marihuana possession. While "[u]nlawful possession of marihuana is a violation punishable only by a fine of not more than one hundred dollars" [N.Y. Penal Law § 221.05 (McKinney 1984)], persons driving in excess of the maximum speed limit "shall for a first conviction thereof be punished by a fine of not more than one hundred dollars *or by imprisonment for not more than thirty days* or by both such fine and imprisonment." N.Y. Veh. & Traf. Law § 1180(f) (McKinney 1984) (emphasis added).

offense.* *See United States* v. *Robinson*, 414 U.S. at 234 n.5 ("the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest . . ."); *see also* LaFave, *Case-By-Case Adjudication Versus Standardized Procedures: The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 151-52 (a search incident to an arrest for a traffic violation is based not on the likelihood of concealed weapons but on the danger to the officer if, in fact, such weapons are present). Thus, an arrest for a routine traffic violation justifies a search of the vehicle incident to that arrest.

In the instant case, however, respondent was not formally arrested for the traffic violation prior to the "search" of his vehicle. *Cf. Henry* v. *United States*, 361 U.S. 98, 103 (1959) (suggesting that an "arrest" occurred when the vehicle was first stopped); *Bailey* v. *United States*, 389 F.2d 305, 308 (D.C. Cir. 1967). Yet, while the intrusion engendered by the traffic stop might not have risen to the level of a formal arrest, it nevertheless constituted a "seizure" within the meaning of the Fourth Amendment [*Berkemer* v. *McCarty*, —— U.S. ——, 82 L.Ed.2d 317, 332-333 (1984); *Colorado* v. *Bannister*, 449 U.S. 1, 4 n.3 (1980); *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979)] and, thus, the search was incident to a "seizure" rather than an "arrest." *See Cupp* v. *Murphy*, 412 U.S. 291, 196 (1973) (up-

* Statistical evidence powerfully confirms the inherent dangers faced by police officers during routine traffic stops. In 1984, 72 officers were killed nationwide in the line of duty, 8 of them during traffic stops. *Source:* FBI, Press Release of May 12, 1985. Of the 80 police officers killed nationwide in the line of duty during 1983, 11 were killed during traffic stops and of the 1,031 officers killed nationwide during the period from 1974-1983, 129 were killed during traffic stops. Indeed, more police officers were killed in the course of traffic stops (129) than were killed "investigating suspicious persons and circumstances" (106). Statistics concerning officers assaulted during traffic stops are no less revealing. Of the 62,324 police officers assaulted nationwide in the line of duty during 1983, 6,210 of them were assaulted during traffic stops. *Source: Law Enforcement Officers Killed and Assaulted:* FBI Uniform Crime Reports—1983, pp. 17-19, 42-43.

holding a limited search under the respondent's fingernails where he had been seized rather than arrested).

The label applied to the initial intrusion should not, however, be determinative of the subsequent authority to search. In *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968) this Court suggested that the authority of police officers to act should hinge not on "overly technical definition[s]", but "on the dangers and demands of the particular situation . . ." *Id.* at pp. 17-18 n.15. Since the traffic stop confrontation is fraught with danger regardless of whether it results in a formal arrest or lesser intrusion [*Michigan* v. *Long*, 77 L.Ed.2d at 1218-1219; *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977); *United States* v. *Robinson*, 414 U.S. at 234], the arbitrary label applied to the intrusion or "seizure" should not impede the officer from insuring his safety through a protective search of the vehicle incident to that "seizure."

Such a conclusion is compelled not only by the risks inherent in a traffic stop, but by the fact that police officers have it within their discretion to elevate these mere traffic "seizures" into full custodial arrests. Because New York, like so many other states* authorizes the warrantless arrest

* States authorizing custodial arrests for routine traffic violations include: Alabama—*Rollins* v. *City of Birmingham*, 344 So.2d 200, 202 (Ala. App. 1977); Arizona—*see State* v. *Susko*, 114 Ariz. 547, 562 P.2d 720, 722 (Ariz. 1977) (en banc); Connecticut—*State* v. *Christian*, 189 Conn. 35, 454 A.2d 262, 264-265 (Conn. 1983); Delaware-Del. Code Ann. tit. 21 § 703 (a), (b)(1982); District of Columbia—*Punch* v. *United States*, 377 A.2d 1353, 1356 (D.C. 1977), *cert. denied*, 435 U.S. 955 (1978); Florida—*see Padron* v. *State*, 449 So.2d 811 (Fla. 1984); Illinois—*see City of Chicago* v. *Wender*, 46 Ill.2d 20, 262 N.E.2d 470 (Ill. 1970); Iowa—*State* v. *Streets*, 330 N.W.2d 3, 5 (Ia. 1983); Kansas—Kan. Stat. Ann. § 8-2105 (1983); Kentucky—*see McHone* v. *Commonwealth*, 576 S.W.2d 242, 243 (Ky. App. 1978); Louisiana—*see State* v. *Morgan*, 445 So.2d 50 (La. App. 1984); La. Code Crim. Proc. Ann. art. 213 (West 1984); Maine—Me. Rev. Stat. Ann. Tit. 15 § 704 (1984); Maryland—*see Jones* v. *State*, 56 Md. App. 101, 466 A.2d 895, 905 (Md. App. 1983); Massachusetts—Mass. Gen. Laws Ann. ch. 90, § 21 (West 1985); Michigan—*see People* v. *LeBeuf*, 93 Mich. App. 421, 286 N.W.2d

(footnote continued on next page)

of motorists stopped for violations of the vehicle and traffic law [N.Y. Crim. Proc. Law § 140.10(2) (McKinney 1984); N.Y. Veh. & Traf. Law § 155 (McKinney 1984); *People* v. *Pollaci*, 68 A.D.2d 71, 75, 416 N.Y.S.2d 34 (2d Dept. 1979); *cf. Hallenbeck* v. *City of Albany*, 99 A.D.2d 639, 472 N.Y.S.2d 187 (3d Dept. 1984)], the officers in the instant case could have first arrested respondent for the traffic violations of speeding [N.Y. Veh. & Traf. Law § 1180(d) (McKinney 1984)] driving with a broken windshield [N.Y. Veh. & Traf. Law § 375 (22) (McKinney 1984), and driving without a license [N.Y. Veh. & Traf. Law § 509 (McKinney 1984)] and then, incident to that arrest, searched the ve-

888, 889 (Mich. App. 1979); Minnesota—*Windschit'l* v. *Commissioner of Public Safety*, 355 N.W.2d 146, 148 (Minn. 1984); Missouri —Mo. Rev. Stat. § 43.195 (1969); New Jersey—*State* v. *Roberson*, 156 N.J. Super. 551, 384 A.2d 195, 196 (N.J. App. 1978); North Carolina—N.C. Gen. Stat. § 20-183 (a) (1983); North Dakota—*State* v. *Bergeron*, 326 N.W.2d 684 (N.D. 1982); Ohio—*State* v. *Rice*, 69 Ohio St.2d 422, 433 N.E.2d 175, 180 (Oh. 1982); Oklahoma—*Seher* v. *State*, 554 P.2d 66, 69 (Okl. App. 1976); Pennsylvania—*see Commonwealth* v. *Long*, 489 Pa. 369, 414 A.2d 113, 115 (Pa. 1980); South Carolina—*State* v. *Parker*, 271 S.C. 159, 245 S.E.2d 904, 905 (S.C. 1978); South Dakota—*State* v. *Halverson*, 277 N.W.2d 723, 725 (S.D. 1979); Texas—*Adams* v. *State*, 669 S.W.2d 391, 394 (Tex. App. 1984); Virginia—Va. Code § 46.1-178.01 (1984); Wisconsin—Wis. Stat. § 345.22 (1984). Among the states prohibiting custodial arrests for traffic violations are: California—*People* v. *McGaughran*, 159 Cal. Rptr. 191, 601 P.2d 207, 210 (Cal. 1979) (en banc); Colorado—*People* v. *Stark*, —— Colo. ——, 682 P.2d 1240, 1243 (Colo. App. 1984); Georgia—Ga. Code § 40-13-53 (1984); Oregon—Or. Rev. Stat. § 484.353(2)(a) (1985); Washington—*State* v. *Hehman*, 90 Wash.2d 45, 578 P.2d 527, 528 (Wash. 1978) (en banc). *See Berkemer* v. *McCarty*, —— U.S. ——, 82 L.Ed.2d 317, 333 n.26 (1984) [*citing* National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance, §§ 16-203-16-206 (Supp. 1979) (advocating mandatory release on citation of all drivers except those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom the officer has "reasonable and probable grounds to believe . . . will disregard a written promise to appear in court")]; *Gustafson* v. *Florida*, 414 U.S. at 266-267 (Stewart, J., concurring) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments); Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 402, n. a (5th ed. 1980).

hicle.* Petitioner submits that because the officers had probable cause to arrest respondent, their search of his vehicle was proper.

This conclusion flows directly from the holding of *New York* v. *Belton*, 453 U.S. 454. As previously stated, that case authorized the search of a vehicle incident to its occupant's arrest, based, in part, on the need to prevent that person from reaching for a weapon. *Id.* at 460. Yet, these safety concerns do not disappear in the traffic stop confrontation merely because the officer has chosen not to arrest the motorist. *See, generally Michigan* v. *Long*, 77 L.Ed.2d at 1218-1219; *Pennsylvania* v. *Mimms*, 434 U.S. at 110; *United States* v. *Robinson*, 414 U.S. at 234. Indeed, the need to prevent a motorist from reaching for a weapon is heightened where that motorist is in no way restrained, as was the respondent in *New York* v. *Belton*, 453 U.S. 454. *Cf. United States* v. *Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985); *United States* v. *Palumbo*, 735 F.2d 1095, 1097 (8th Cir.), *cert. denied*, —— U.S. ——, 83 L.Ed.2d 268 (1984)

* Although in *People* v. *Marsh*, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967), the New York Constitution was construed as prohibiting searches of the *person* incident to arrests for traffic violations, that decision was grounded on the erroneous presumption that ". . . the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted." *Id.* at 101. In the years since *People* v. *Marsh*, *supra*, however, both this Court and the New York Court of Appeals have become all too aware of the dangers faced by police officers during traffic stops for such routine violations as speeding. *See* p. 40, n., *ante; Pennsylvania* v. *Mimms*, 434 U.S. at 110; *United States* v. *Robinson*, 414 U.S. at 234. In recognition of the dangers inherent in the routine traffic stop, the New York Court of Appeals has, since *Marsh*, interpreted the New York Constitution as permitting protective frisks of motorists incident to their arrests for traffic offenses. *See, e.g. People* v. *Ellis*, 62 N.Y.2d 393, 397, 477 N.Y.S.2d 106, 465 N.E.2d 826 (1984); *People* v. *Copeland*, 39 N.Y.2d 986, 387 N.Y.S.2d 234, 355 N.E.2d 288 (1976); *People* v. *Troiano*, 35 N.Y.2d 476, 478, 363 N.Y.S.2d 943, 323 N.E.2d 183 (1974). In any event, insofar as these cases concern searches of the motorists themselves, they are inapposite to the instant *vehicle* search incident to a routine traffic stop. That precise issue was intentionally left unresolved by the New York Court of Appeals as a matter of state constitutional law in *People* v. *Belton*, 55 N.Y.2d 49, 51, 447 N.Y.S.2d 873, 432 N.E.2d 745 (1982) (on remand from this Court).

(both holding that the fact that motorists were handcuffed at the time their vehicles were searched incident to their arrests was irrelevant under *Belton*). The motorist who remains at liberty while police officers concentrate on the routine administrative duties associated with the traffic stop, has unimpeded access to his vehicle and, consequently, to any weapons or dangerous instruments concealed therein. Obviously, the situation is more fluid where the motorist is not arrested and one need not possess a robust imagination to perceive of the potentially tragic consequences in such an unsettled atmosphere. Clearly then, an officer's need to preserve his safety is even more acute and, so too, his need to search the vehicle, where he chooses not to arrest the motorist for a traffic offense immediately.

The officer's need to preserve his own safety, however, should not have to be fulfilled by a requirement that he arrest all traffic offenders. Indeed, police officers should be encouraged, if possible, not to arrest traffic offenders who are, for the most part, law-abiding citizens. *See Berkemer* v. *McCarty*, 82 L.Ed.2d at 333, n.26 [*citing* National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 16-203-16-206 (Supp. 1979) (advocating the issuance of summonses to drivers rather than their arrest)]. But, if such a policy is to be furthered, those officers evincing a proper regard for the liberty interests of motorists should not be required to assume the risk that those motorists are not law-abiding citizens. We can ill afford to penalize those conscientious officers choosing not to arrest traffic violators initially by preventing them from undertaking the same protective measures that would have been authorized had they first arrested those motorists. Thus, the worthy goal of deterring both needless traffic arrests and senseless traffic violence would be served through protective vehicle searches.

Moreover, aside from the legitimate policy interests furthered by protective searches, these searches should be authorized because, as a general principle, the power to search

emanates not from the arrest itself, but rather, from the probable cause to arrest. Although the search is generally justified as being "incident to an arrest," the arrest itself must be predicated on the existence of probable cause. *See Sibron* v. *New York*, 392 U.S. 40, 76-77 (1968) (Harlan, J., concurring) ("There is *no* case in which a respondent may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards'.") It is for this reason that a "search incident to arrest" may actually precede that arrest where probable cause existed from the outset and was not established as a result of the search. *See Rawlings* v. *Kentucky*, 448 U.S. 98, 110-111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973); *United States* v. *Brown*, 463 F.2d 949, 950 (D.C. Cir. 1972). Applying this principle to the routine traffic stop situation it becomes clear that protective vehicle searches should be authorized.

Probable cause to arrest for the traffic violation exists from the outset and this probable cause, rather than the arrest itself should permit a "search incident to arrest," even though this search technically precedes any arrest. *See Rawlings* v. *Kentucky*, 448 U.S. at 111. Potential contraband recovered during the search may independently establish probable cause to arrest for a different crime, but since that contraband is not required to establish the initial probable cause to arrest for the traffic violation, the search nevertheless comes within the search incident to arrest exception. *See Rawlings* v. *Kentucky*, *supra*, at 111 n.6. Thus, the instant search of respondent's vehicle which preceded his actual arrest for weapon's possession was nevertheless "incident" to the probable cause to arrest for the numerous traffic violations, which existed from the outset. The search was, therefore, proper.

Having shown that an officer who chooses not to arrest a motorist for a traffic violation may nevertheless undertake a protective search of the vehicle, the question remains as to the scope of that search. Again, the answer is provided by *New York* v. *Belton*, 453 U.S. 454 wherein this Court limited the permissible search to the passenger compartment and any closed containers located therein, including the glove compartment, on the theory that these were the areas "into which an arrestee might reach in order to grab a weapon or evidentiary item." *New York* v. *Belton, supra*, at 460 (*quoting Chimel* v. *California*, 395 U.S. at 763). Since the search incident to a traffic seizure is similarly prompted by the risk of concealed weapons in the passenger compartment, its scope should be strictly limited to the passenger compartment and closed containers located therein, including the glove compartment.* A due regard for the legitimate privacy interests of the motorist, however, suggests that the scope of the search not extend to the person of the motorist.** Although the likelihood that a motorist stopped for a traffic violation will conceal a weapon on his person is comparable to the likelihood that he will conceal that weapon in the passenger compartment, we recognize that the physical integrity and legitimate privacy interests of the individual greatly exceed that of the automobile, in which a motorist can have only a limited expectation of privacy.† *See California* v. *Carney*, —— U.S. ——,

* Where, however, police officers have probable cause to believe that the trunk contains contraband, they may search it under this Court's holding in *United States* v. *Ross*, 456 U.S. 798 (1982).

** Where there are indicia that the motorist is either armed or dangerous, the officer may, of course, frisk that motorist. *See, e.g. Michigan* v. *Long*, 77 L.Ed.2d 1201; *Pennsylvania* v. *Mimms*, 434 U.S. 106.

† Notwithstanding this Court's holdings in *United States* v. *Robinson*, 414 U.S. 218 and *Gustafson* v. *Florida*, 414 U.S. 260 which authorized searches of individuals incident to their arrests for traffic violations, we submit that unlike vehicle searches, which should be authorized where traffic arrests are not made, a search of the individual is so much more intrusive and the routine traffic stop so common, that a formal arrest must remain as the prerequisite for a search of the individual.

53 U.S.L.W. 4521, 4523 (1985); *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality); *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973). Moreover, insofar as the passenger compartment is, in large part, readily viewable to the outside world, [*Texas* v. *Brown*, 460 U.S. 730, 740-741 (1983); *Cardwell* v. *Lewis*, 417 U.S. at 590], the intrusion engendered by its search is clearly outweighed by the necessity of the officer to preserve his safety.

In urging this Court to adopt the position that police officers who forego the formal arrest of motorists may nevertheless search the passenger compartment of their vehicles, we are not unmindful that many motorists may be affected by these searches each year. *See Delaware* v. *Prouse*, 440 U.S. at 658 ("Vehicle stops for traffic violations occur countless times each day . . ."). The large number of motorists involved does not lend the gloss of "arbitrariness" or "harassment" to these searches, however, for their pre-requisite is always an offense which the particular state* has deemed sufficiently pernicious to warrant a full custodial arrest. *Cf. Delaware* v. *Prouse*, 440 U.S. at 663 (invalidating arbitrary vehicle spot checks); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) (invalidating arbitrary vehicle spot checks by border patrol agents). Thus, despite the common nature of the offense, the motorist must nevertheless break the law in order for his vehicle to be searched and this unyielding requirement insures that those motorists obeying the rules of the road need not fear indiscriminate searches of their vehicles.

Indeed, it is illogical to presume that police officers who, at present, are not using their power to arrest traffic offenders irresponsibly [*see Michigan* v. *Long*, 77 L.Ed.2d at 1210 n.1] will use their authority to effect protective vehicle searches incident to traffic stops not resulting in arrest

* See note, pp. 42-43, *ante*.

any less responsibly. Moreover, the risk that these protective searches will somehow become pretexts for the recovery of evidence is no more pronounced than the current risk that the traffic stop itself will become a mere pretext. In any event, we are confident that such aberrant police conduct will not only be detected, but amply deterred, through pre-trial suppression hearings which assess the officer's credibility. *See, generally United States* v. *Lefkowitz*, 285 U.S. 452, 467 (1932) ("An arrest may not be used as a pretext to search for evidence").

In sum, police officers lawfully stopping vehicles for traffic violations yet choosing not to arrest the drivers, should be permitted to undertake protective searches of the passenger compartments of those vehicles. By permitting such protective searches, this Court will not only stem the tragic tide of police deaths,* but will provide a "bright line" rule, easily understood and applied by police officers who must confront the traffic stop situation on a daily basis.** *See, e.g. Smith* v. *Illinois*, —— U.S. ——, 83 L.Ed. 2d 488, 495-496 (1984) (bright line rule that all questioning must cease upon a request for counsel); *New York* v. *Belton*, 453 U.S. at 458-460 (recognizing the need for a "workable rule"); *Baldasar* v. *Illinois*, 446 U.S. 222, 230 (1980) (Blackmun, J., concurring) ("bright line" approach to the right to counsel for misdemeanor offenses). Under such a bright line rule, it becomes clear that the weapon found underneath the driver's seat of respondent's vehicle following a traffic stop for speeding, was lawfully recovered.

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* *See* note, page 40, *ante*.

** The need for police guidance concerning the parameters of permissible conduct during a routine traffic stop was the basis for the petition for certiorari. Petition for Certiorari at pp. 5-6.

Conclusion

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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(5)

No. 84-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

v.

BENIGNO CLASS,

Respondent.

**On Writ Of Certiorari
To The Court of Appeals
Of The State of New York**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the judgment of the New York Court of Appeals was based on adequate and independent state grounds where the court's opinion was expressly predicated on the state constitution and relied on a long line of that court's prior search and seizure rulings.

2. Whether Officer McNamee violated respondent's Fourth Amendment right to be free from unreasonable searches and seizures when, upon stopping respondent's car for a traffic infraction and lacking any reason to believe that the car was stolen, he opened the door, entered the vehicle, reached inside, and moved papers on the dashboard, in order to search for the vehicle identification number.

3. Whether petitioner's claims, raised for the first time before this Court, that (1) a motorist lacks a reasonable expectation of privacy in a vehicle when he has no license, and (2) the police are entitled to search a motorist's vehicle whenever they are authorized to place the person under arrest for a traffic infraction, are not properly or adequately presented for this Court's review and, in any event, are meritless.

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POINT I

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OFFICER McNAMEE VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, UPON STOPPING RESPONDENT'S CAR FOR A TRAFFIC INFRACTION AND LACKING ANY REASON TO BELIEVE THAT THE CAR WAS STOLEN, HE OPENED THE DOOR, ENTERED THE VEHICLE, REACHED INSIDE, AND MOVED PAPERS ON THE DASHBOARD, IN ORDER TO SEARCH FOR THE VEHICLE IDENTIFICATION NUMBER (VIN). 15

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JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257(3). Respondent maintains that the Court lacks jurisdiction because the judgment of the New York Court of Appeals was based on adequate and independent state grounds (*see* Point I, *post*).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The New York Constitution, Article I, Section 12, provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

During the afternoon of May 11, 1981, Police Officers Lawrence Meyer and William McNamee were on routine patrol. They observed respondent driving a 1972 Dodge Charger with a cracked windshield 5 to 10 miles an hour over the speed limit, a speed Officer McNamee deemed "too high for the streets."[1] The officers pulled respondent

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[1] Officer Meyer testified that respondent was traveling at a speed of 35 or 40 miles an hour (A. 13). Since the standard speed limit within

over in a routine traffic stop (Meyer: A. 11-13, 16; McNamee: A. 21-23).

Respondent parked his car at the side of the road; Officer Meyer parked his vehicle directly behind it. Respondent exited his car, closed the door, and joined Officer Meyer at the rear of respondent's vehicle. Respondent gave Meyer the car's registration and insurance papers, but informed Meyer that he had no driver's license (Meyer: A. 12, 15).[2] Meanwhile, Officer McNamee, unaware of respondent's lack of a license, walked over to respondent's car and opened the door on the driver's side in order to locate the vehicle identification number (VIN) (Meyer: A. 12, 15-17; McNamee: A. 21, 24, 26-27). While McNamee searched for the VIN, respondent continued speaking with Officer Meyer (McNamee: A. 26-27).

Officer McNamee opened the door of respondent's car. He first looked, unsuccessfully, for the VIN on the door panel, and then on the dashboard. A piece of paper on the dashboard prevented him from inspecting the VIN from outside the car. To see the number, McNamee reached inside the vehicle and moved the paper. The officer testified that, while doing so, he looked down and saw a gun handle sticking out from under the front seat of the car (McNamee: A. 21, 25-26). Respondent later admitted that the gun belonged to him (Class: A. 36).

Officer McNamee provided no explanation for his desire to inspect the VIN. Neither did Officers McNamee or

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New York City is 30 miles per hour [New York City Traffic Regulations § 60(a)], the dissenting Justice in the Appellate Division and the entire Court of Appeals found that respondent was proceeding at a speed of 5 to 10 miles per hour over the speed limit (A. 49, 55, 61).

[2] At the suppression hearing, respondent answered "No" to the prosecutor's question whether "[o]n that day, [he was] a licensed operator." The judge presiding at the hearing precluded further inquiry into whether respondent ever had a driver's license (A. 36).

Meyer ever voice any suspicion that respondent's car was stolen. Indeed, there was no testimony that the officers ran a radio check on respondent's vehicle to determine whether it had been reported stolen.[3] McNamee, the officer who searched for the VIN, was not in possession of the vehicle's registration or insurance card. Nor did he, upon finding the VIN, check the number against anything or copy it down so he could compare it to these documents (McNamee: A. 25-27). Indeed, neither officer claimed to have checked the VIN against anything else. Notably, there was no testimony that Officer McNamee's search for the VIN was required by any standard police procedures or regulations.

Once Officer McNamee found the gun, he showed it to Meyer, who then arrested respondent for possession of the weapon. The officers also gave respondent a summons for being an unlicensed driver and for driving a car with a cracked windshield (Meyer: A. 17-19). Respondent was neither arrested for the two traffic infractions nor even issued a summons for speeding. Nor was there any testimony that he would have been arrested for the traffic infractions had he not been arrested for possession of the gun.

In its ruling denying respondent's motion to suppress the gun, the court specifically found that "there was no reason to believe the vehicle [respondent] was driving was stolen" (A. 45). The court nonetheless concluded that Officer McNamee's actions were "reasonable and prudent under the circumstances." This finding was based on two facts: respondent's conduct in exiting his vehicle and walking over to the police, and respondent's lack of a driver's

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[3] In fact, as the State concedes (Br. for Pet. at 37), the car was not stolen. It belonged to respondent's brother-in-law (Class: A. 32). Everything in the car's documentation was in order (McNamee: A. 28).

license, which was not then known to McNamee (A. 45-46).

After the court denied his suppression motion, respondent pleaded guilty to criminal possession of a weapon in the third degree. New York Penal Law § 265.02(4) (McKinney Supp. 1984-1985). Although this crime is a felony in New York, respondent was sentenced only to a five year term of probation, after the court found the existence of mitigating circumstances. New York Penal Law § 70.02(5)(b) (McKinney Supp. 1984-1985). In 1984, respondent was discharged from probation.

Respondent appealed the judgment of conviction, contending that the police violated his right, under both the New York and United States Constitutions, to be free from unreasonable searches and seizures, when Officer McNamee entered respondent's car to inspect the VIN without having any reason to believe that the car was stolen. The New York Supreme Court, Appellate Division, affirmed the judgment without opinion (A. 48-49). *People* v. *Class*, 97 A.D.2d 741, 468 N.Y.S.2d 892 (1st Dept. 1983). Justice John Carro dissented, writing that respondent's conduct did not create any suspicion sufficient to justify Officer McNamee's intrusion into the car (A. 49-51).

Respondent then appealed to the New York Court of Appeals, which, by a 5 to 2 decision, reversed the order of the Appellate Division, granted respondent's motion to suppress, vacated his guilty plea, and dismissed the indictment (A. 53). *People* v. *Class*, 63 N.Y.2d 491, 472 N.E.2d 1009 (1984). In an opinion written by Judge Judith Kaye, the court held that Officer McNamee violated respondent's rights, under the New York Constitution and the Fourth Amendment, to be free from unreasonable searches and seizures when he entered respondent's car to search for the VIN.

First, the court held that Officer McNamee's nonconsensual entry into respondent's car to view the VIN constituted a search (A. 57). Second, the court recognized both the governmental interest in VIN inspections and the fact that such inspections usually entail a "lesser invasion of privacy than a full-blown search" (A. 58). Although the court suggested that these factors might justify a requirement of less than probable cause, it concluded that they could not justify completely eliminating the constitutional requirement of a factual predicate for the search. Thus, since Officer McNamee possessed neither probable cause nor any reason to believe that respondent's car was stolen, his entry into the vehicle was unconstitutional (A. 56-59). Third, the court rejected the State's argument that the "public nature" of a VIN negates any expectation of privacy. The court explained that the requirement that manufacturers place VINs on vehicles "does not automatically sanction police intrusion into private space" in order to read the number (A. 58). The court further held that New York Vehicle & Traffic Law § 401 (McKinney Supp. 1984-1985), which permits a police officer to demand of a motorist information necessary to identify the vehicle and owner, does not authorize an officer to intrude into a private vehicle in order to obtain such information. Rather, the statute authorizes police officers only to *demand* information of a motorist, and requires the *motorist* to provide it (A. 60).

In dissent, Judge Hugh R. Jones argued that there was no expectation of privacy with respect to a VIN, and concluded that an officer is entitled to enter a vehicle to inspect the VIN upon lawfully stopping a motorist for a traffic infraction (A. 61-63).

Throughout the litigation of this case in the New York courts, the State has asserted, as the sole basis for upholding Officer McNamee's entry into respondent's

vehicle, that a police officer, upon stopping any motorist for a routine traffic infraction, has the right to intrude into the car to inspect the VIN, even if the officer lacks any reason to believe that the car is stolen. Now peititioner contends, for the first time, that (1) an unlicensed motorist lacks a legitimate expectation of privacy in his vehicle, and (2) a police officer may search the passenger compartment of a vehicle whenever he is authorized to arrest a motorist for a traffic violation even if he does not, in fact, make an arrest (Br. for Pet. at 34n.*). As these issues were never previously raised, the state courts had no occasion to rule on them.

SUMMARY OF ARGUMENT

1. The judgment of the New York Court of Appeals rested on an adequate and independent ground in state law: the court specifically held that state law—Vehicle & Traffic Law § 401 (McKinney Supp. 1984-1985) — did not authorize the police conduct at issue and that Article I, Section 12, of the New York Constitution, which protects the public against unreasonable searches and seizures, prohibited it. The New York constitutional provision has its own well-established identity, independent of the Fourth Amendment. Therefore, the judgment of the Court of Appeals is beyond this Court's review because it rested on an adequate and independent ground in state law. *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983).

The New York Court of Appeals' reliance on New York law on this point is clear from the face of its opinion. Since its decision in *People* v. *Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967), the New York Court of Appeals has held that, as a matter of state constitutional law, a search of a motorist or his vehicle may not be predicated upon a motorist's commission of an ordinary traffic infraction. In the instant case, the court relied on *Marsh* and its progeny to support its conclusion that Officer McNamee vio-

lated respondent's right to be free from unreasonable searches and seizures, as guaranteed by the New York Constitution, by entering his vehicle to inspect the VIN.

2. Since Officer McNamee neither suspected, nor had reason to believe, that the car was stolen, his entry into respondent's car violated respondent's right to be free from unreasonable searches and seizures.

Officer McNamee's entry into respondent's vehicle for the purpose of looking for the VIN constituted a "search" within the meaning of the Fourth Amendment because the officer intruded upon respondent's legitimate and reasonable expectations of privacy when he entered the vehicle, revealing information contained within the car that he could not have ascertained without making the intrusion. *United States* v. *Jacobsen*, 466 U.S. ____, 80 L.Ed.2d 85, 94 (1984).

As a general rule, an officer may not search the interior of an automobile unless he has probable cause. *United States* v. *Ross*, 456 U.S. 798 (1982). Nor may an officer engage in a lesser intrusion upon a motorist's expectation of privacy in a vehicle unless he has an objectively reasonable basis, founded on specific and articulable facts, to do so. *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Terry* v. *Ohio* 392 U.S. 1 (1968). Since Officer McNamee possessed neither probable cause nor any articulable basis for his action, such as a belief that respondent's car was stolen, he violated the Fourth Amendment when he intruded into the car.

3. Because the State's claims were neither asserted in the state courts nor passed on below, this Court should not consider the State's present assertions that (1) an unlicensed motorist lacks a legitimate expectation of privacy in his vehicle, and (2) a police officer may search the passenger compartment of a vehicle whenever he is authorized to arrest the motorist for a traffic infraction,

even where the officer does not arrest or intend to arrest the motorist (Br. for Pet. at 34 n.*). *Illinois* v. *Gates*, 462 U.S. 213, 221-224 (1983).

In any event, these arguments should be rejected because they lack precedent and justification and would negate the substantial protections afforded by the Fourth Amendment. First, petitioner's "unlicensed motorist" theory ignores the fact that a driver has a legitimate expectation of privacy in a vehicle lawfully in his possession, which gives him standing to litigate the constitutionality of any intrusion therein. *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978). Second, petitioner's reliance on the "search incident to arrest" doctrine is misplaced. Although the police could have placed respondent under arrest solely on account of his traffic infractions, they did not do so and there is no basis to believe they would have done so. Moreover, the "search incident to arrest" doctrine is premised on the minimal expectation of privacy that survives after an officer makes an arrest, the police officer's need to protect himself and prevent his prisoner from escaping, and the need to preserve evidence. Therefore, the doctrine is simply inapplicable in a case where, as here, the officers merely stop a motorist for an ordinary traffic infraction and make the arrest only after conducting their search and based solely on the evidence seized as a result of that search. *Sibron* v. *New York*, 392 U.S. 40, 67 (1968).

ARGUMENT

POINT I

THE JUDGMENT OF THE NEW YORK COURT OF APPEALS WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS WHERE THE COURT'S OPINION WAS EXPRESSLY PREDICATED ON THE STATE CONSTITUTION AND RELIED ON A LONG LINE OF THAT COURT'S PRIOR SEARCH AND SEIZURE RULINGS.

Because of limitations on its jurisdiction and in view of the rule against rendering advisory opinions, this Court has no power to review judgments of state courts that rest on adequate and independent state grounds. In order "scrupulously to observe the long standing rule [against reviewing] a judgment of a state court that rests on an adequate and independent ground in state law," this Court can decide a case only where the result was mandated by federal law. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-128 (1945).

In *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983), the Court reiterated the rule against reviewing judgments of state courts that rest on adequate and independent state grounds. However, for cases where "the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court adopted a "plain statement" rule, requiring the state court to make it clear that it relied on federal cases only as persuasive authority. *Id.* at 1040-1041. In the instant case, because the adequacy and independence of the state ground is clear from the face of the state court's opinion, the "plain statement" rule adopted in *Long* does not apply. Accordingly, the judgment of the New York Court of Appeals is beyond this Court's power of review.

The New York Court of Appeals held that New York Vehicle & Traffic Law § 401 (McKinney Supp. 1984-1985) does not authorize, and the New York Constitution for-

bids, a police officer's action, upon stopping a motorist for a routine traffic infraction, in opening and entering the car to inspect the VIN. In the very first sentence of its opinion, the court expressly cited Article I, Section 12, of the New York Constitution as a basis for holding that Officer McNamee violated respondent's right to be free from unreasonable searches and seizures (A. 55). In addition to that explicit invocation of the state constitution, the court made it plain that its judgment flowed from its own prior rulings in a host of cases: *People* v. *David L.*, 56 N.Y.2d 698, 436 N.E.2d 1324, *cert. denied*, 459 U.S. 366 (1982); *People* v. *Miller*, 43 N.Y.2d 789, 373 N.E.2d 286 (1977), *aff'g* 52 A.D.2d 425, 385 N.Y.S.2d 457 (1st Dept. 1976); *People* v. *Perel*, 34 N.Y.2d 462, 315 N.E.2d 452 (1974); *People* v. *Cruz*, 34 N.Y.2d 362, 314 N.E.2d 39 (1974); *People* v. *Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464 (1971); and *People* v. *Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967). Of these decisions, *David L.*, *Perel*, *Cruz*, and *Marsh* all expressly rely on the New York Constitution.

The foundation for the ruling of the New York Court of Appeals in the instant case is *People* v. *Marsh*, *supra*, 20 N.Y.2d 98, 228 N.E.2d 783, in which that court first held that, upon stopping a motorist for an ordinary traffic infraction, a police officer is not entitled to search the motorist. On its face, *Marsh* was based on state law. Before even mentioning the state or federal constitution, Chief Judge Fuld wrote for the court that the New York Legislature never authorized police officers to conduct a search merely upon stopping a motorist for a routine traffic violation. In cases of routine traffic violations, New York law authorizes a police officer to issue a summons to a motorist in lieu of making an arrest. Indeed, in New York City it is customary to do so. *Id.* at 100-101, 228 N.E.2d at 785. As it is neither the necessary nor the usual procedure in New York to arrest a motorist for a routine traffic violation, an officer may not search the motorist

> unless, when the vehicle is stopped, there are reasonable grounds for suspecting that the officer is in dan-

> ger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction.

Id. at 101, 228 N.E.2d at 786.

One rationale for this rule is that, quite simply, evidence of an ordinary traffic infraction is not to be found inside the vehicle. *Id.* at 101, 228 N.E.2d at 785. Additionally, the court reasoned that "[a] motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity. . . ." *Id.* at 101, 228 N.E.2d at 786. The Court of Appeals further held that a search is not authorized even where an arrest warrant had been issued on account of the motorist's violation of the traffic laws. The court wrote:

> [T]he statutory scheme does not contemplate treating [the motorist] as a common criminal to be booked, photographed, fingerprinted and jailed. It is equally degrading—and most assuredly not the Legislature's intention—to subject him to the affront of a search when one is not necessary for the proper execution of the warrant. In short, no search for a weapon is authorized as incident to an arrest for a traffic infraction, regardless of whether the arrest is made on the scene or pursuant to a warrant, unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime.

Id. at 102, 228 N.E.2d at 786.

It is beyond doubt that the rule established by the Court of Appeals in *Marsh* is soundly based on state law. In *People* v. *Perel*, 34 N.Y.2d 462, 468, 315 N.E.2d 452, 456 (1974), which the court also cited in the instant case (A. 57), the Court of Appeals confirmed that *Marsh* held, *as a matter of state law,* that a search may be unreasonable upon an arrest for particular offenses.[4] Indeed, the

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[4] In *People* v. *Weintraub*, 35 N.Y.2d 351, 353, 320 N.E.2d 636, 637

State concedes as much in its brief before this Court (Br. for Pet. at 44 n.*). Only in the penultimate paragraph of its *Marsh* opinion, after establishing that the New York Legislature never authorized the police to conduct a search incident to an arrest for a routine traffic violation, did the court consider whether this rule was required by the state or federal constitution. Moreover, when it did so, the court's citation to the relevant constitutional provisions made it plain that the result was dictated by the state constitution, as well as the federal constitution: "Indeed, this conclusion is also dictated by the constitutional prohibition against unreasonable searches and seizures. (U.S. Const., 4th Amdt; N.Y. Const., art. I, § 12)." *People* v. *Marsh*, 20 N.Y.2d at 102, 228 N.E.2d at 786 (citations omitted).

Having already decided in *Marsh* that New York law prohibits a police officer from searching a motorist stopped for a routine traffic violation, it logically followed that the Court of Appeals would hold, in the instant case, that a police officer may not intrude into a motorist's vehicle to search for the VIN where the officer lacks any reason to believe that the car is stolen.

Indeed, the court's analysis of the relevant statutory and constitutional provisions in the instant case closely parallels that in *Marsh*. As it did in *Marsh*, the Court of Appeals looked to the state statute, and the relevant

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(1974), the Court of Appeals reiterated that its holding in *Marsh* was based on legislative policy as well as on the federal and state constitutional guarantees against unreasonable searches and seizures. Moreover, the rule the Court of Appeals established in *Marsh* survives as a matter of state law, notwithstanding this Court's decision in *United States* v. *Robinson*, 414 U.S. 218 (1973). *People* v. *Troiano*, 35 N.Y.2d 476, 479, 323 N.E.2d 183, 186 (1974) (Rabin, J., concurring). *See generally* Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 Buffalo L. Rev. 157, 166-173 (1979).

legislative intent, to determine whether state law authorized the police conduct at issue. As in *Marsh*, the court found that it did not. The court reasoned that New York Vehicle & Traffic Law § 401, which gives police officers the right to demand information, could not be construed as authorizing a search for that information, whether it be a search of the motorist or of his vehicle (A. 59-60). Moreover, as in *Marsh*, when addressing the constitutional question, the court explicitly declared that such a search violated the state, as well as federal, protections against unreasonable searches and seizures (A. 55).

The conclusion that the judgment of the New York Court of Appeals in the instant case was based on adequate and independent state grounds is reinforced by that court's long tradition of interpreting the New York Constitution generously in favor of the public's right to be free from unreasonable searches and seizures.[5] For instance, in *People* v. *Elwell*, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477 (1980), the New York Court of Appeals held that the New York Constitution goes beyond this Court's holdings in *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Draper* v. *United States*, 358 U.S. 307 (1959), as to the corroboration required to sustain a warrantless search or arrest based on an informant's tip. Likewise, as to

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[5] The mere fact that Article I, Section 12, of the New York Constitution contains the same language as the Fourth Amendment in no way prevents the New York provision from being interpreted to provide greater protection to the public's right to be free from unreasonable searches and seizures than would the Federal Constitution. *Sibron* v. *New York*, 392 U.S. 40, 60-61 (1968); *People* v. *Belton*, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982). In light of the court's express reliance on state constitutional and statutory law, the fact that the court also cited the Fourth Amendment and federal cases does not negate the conclusion that the judgment is based on adequate and independent state grounds. *See State* v. *Casal*, 410 So.2d 152 (Fla. 1982), *writ dismissed as improvidently granted sub nom. Florida* v. *Casal*, 462 U.S. 637 (1983).

searches incident to arrest, the Court of Appeals has interpreted Article I, Section 12, of the New York Constitution in a manner different than this Court has interpreted the Fourth Amendment. *See People* v. *Belton*, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982); *People* v. *Gokey*, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724 (1983); *People* v. *Smith*, 59 N.Y.2d 454, 457-459, 452 N.E.2d 1224, 1227 (1983).

The ample state grounds relied upon here serve to distinguish the instant case from *Michigan* v. *Long*, 463 U.S. 1032 (1983). There, this Court held that a state court decision which "relied *exclusively* on [federal caselaw]" and cited "[n]ot a single state case" in support of the result was not based on adequate and independent state grounds. *Id.* at 1043 (emphasis in original). Indeed, an inspection of the Michigan Supreme Court's decision in *People* v. *Long*, 413 Mich. 461, 320 N.W.2d 866 (1982), reveals that the result turned entirely on that court's analysis of this Court's holding in *Terry* v. *Ohio*, 392 U.S. 1 (1968). In this case, by contrast, the New York Court of Appeals cited ample state grounds to support its analysis and result. In *Long*, the defendant never raised his state law claim until his case was before this Court. *People* v. *Long*, 419 Mich. 636, 359 N.W.2d 194, 200 (1984) (on remand). By contrast, in the instant case respondent maintained, throughout his appeals in the state courts, that McNamee's intrusion into his vehicle violated both state and federal law.

This Court's cases since *Long* reinforce the conclusion that the judgment of the New York Court of Appeals in the instant case rests on adequate and independent state grounds. In *Ohio* v. *Johnson*, 467 U.S. ____, 81 L.Ed.2d 425, 432 n.7 (1984), this Court held that, where the syllabus to the state court's opinion, the only portion on which the entire state court had to agree, referred to the prohibition against double jeopardy without expressly

invoking the state's double jeopardy provision, the judgment did not rest on adequate and independent state grounds. Here, by contrast, in the first sentence of its opinion the state court expressly relied on Article I, Section 12, of the New York Constitution, which protects the public against unreasonable searches and seizures (A. 55). Similarly, unlike the state court opinion in *Maine* v. *Thornton*, 466 U.S. ___, 80 L.Ed.2d 214, 222 n.5 (1984), the New York Court of Appeals relied on the state constitution and cases which were firmly based on state law. Like *Colorado* v. *Nunez*, ___ U.S. ___, 79 L.Ed.2d 338, 341 (1984), the instant case involves a situation where the state court based its judgment on its own prior cases (*e.g.*, *People* v. *Marsh*) which in turn were founded on state law. In a case where, as here, the decision sought to be reviewed rests on both state and federal grounds, either of which are dispositive, this Court lacks jurisdiction. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). The writ should therefore be dismissed.

POINT II

OFFICER McNAMEE VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, UPON STOPPING RESPONDENT'S CAR FOR A TRAFFIC INFRACTION AND LACKING ANY REASON TO BELIEVE THAT THE CAR WAS STOLEN, HE OPENED THE DOOR, ENTERED THE VEHICLE, REACHED INSIDE, AND MOVED PAPERS ON THE DASHBOARD, IN ORDER TO SEARCH FOR THE VEHICLE IDENTIFICATION NUMBER (VIN).

As a general rule, a police officer violates the Fourth Amendment when he searches a vehicle without probable cause. Any constitutionally cognizable intrusion into a vehicle, moreover, even if it is not deemed a "full-blown search," is impermissible unless the officer has an objectively reasonable basis, founded on specific and articula-

ble facts, to support such action. Where a police officer opens the door of a private automobile and enters, without individualized suspicion, to search for the VIN, disturbing the motorist's papers in the process, the officer violates the motorist's right to be free from unreasonable searches and seizures.

A. When Officer McNamee Opened The Door Of Respondent's Car And Entered It To Look For The VIN, And Thus Exposed Private Areas Not Otherwise Visible, He Conducted A Search Governed By The Fourth Amendment.

Under the Fourth Amendment, a police officer conducts a "search" when he infringes upon "an expectation of privacy that society is prepared to consider reasonable." *United States* v. *Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 94 (1984). The word "search" means a prying into hidden places in an effort to discover objects or information not open to view. *Black's Law Dictionary* 1211 (5th Ed. 1979). It is this very common sense notion that has animated the Court's rulings in this area. When a police officer, as here, opens the door of a private automobile and enters the car to probe for information, and thereby exposes areas otherwise inaccessible to view, he conducts a search that must meet the requirements of the Fourth Amendment.

As a threshold matter, it is well-established that, despite the special nature of an automobile, a motorist has some legitimate expectation of privacy within the interior of a car. *See Delaware* v. *Prouse*, 440 U.S. 648, 662-663 (1979). The State concedes as much (Br. for Pet. at 20). As in any case where government agents intrude upon legitimate expectations of privacy, their action must be measured against the requirements of the Fourth Amendment.

In determining whether a police officer conducts an intrusion into an area in which there is a legitimate expec-

tation of privacy, and thus must comply with the requirements of the Fourth Amendment, the standard this Court has consistently articulated considers whether the officer exposes areas or information to which he otherwise would not have access. Thus, the placement of a "beeper" on an automobile to monitor a person's movements on the road is not a search, as it exposes nothing but openly visible, public conduct as to which one accordingly lacks any expectation of privacy. *United States* v. *Knotts*, 460 U.S. 276, 282 (1983). Or, when an officer peers into the interior of a private automobile from outside the vehicle, even if he is aided by a flashlight, the officer conducts no search, as he merely views that which would be visible to "inquisitive passersby" and as to which one therefore could not reasonably entertain any expectation of privacy. *Texas* v. *Brown*, 460 U.S. 730, 739-740 (1983). Similarly, where an intrusion can be so limited that no personal information is exposed, but only contraband is detected, there is no search within the Fourth Amendment. *United States* v. *Place*, 462 U.S. 696, 707 (1983) (canine sniff); *United States* v. *Jacobsen*, *supra*, 80 L.Ed.2d at 100-101 (chemical test of drugs).

Applying these precedents, it is indisputable that Officer McNamee conducted a "search" when he opened the door of respondent's car and entered the vehicle in an effort to inspect the VIN. The information McNamee sought, by the officer's own testimony, could not have been discovered without making a physical intrusion into respondent's vehicle (McNamee: A. 21, 25). Moreover, McNamee's investigative procedure was not so limited as to expose only the mere presence of "contraband" (here, by analogy, the VIN), as his intrusion enabled him to view anything respondent may have placed in the front part of the vehicle. Indeed, the State concedes that Officer McNamee conducted a "limited entry and search" into respondent's vehicle, which had the "effect of presenting

to police view a few locations near the floor of the car which might have otherwise remained unseen" (Br. for Pet. at 14, 29, 30, 33). Thus, McNamee's intrusion into the car may have been "less intrusive than a full-scale search but it [did] reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained." *United States* v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 541-542 (1984).[6]

While conceding that an individual retains an interest of privacy within his vehicle (Br. for Pet. at 20, 24, 47), the State asserts that the pertinent and dispositive fact is respondent's lack of expectation of privacy in the VIN itself, and that the "special nature and purpose of the VIN" requires that Fourth Amendment standards be ignored (*id.* at 18). Such a proposition stands Fourth Amendment analysis on its head, as it ignores the specific constitutional protection attaching to the *situs* of the intrusion ("persons, houses, . . . and effects"), and looks solely to the nature of the *object* sought to be discovered. Indeed, this Court has held that, even where there is no expectation of privacy in the object of discovery (such as contraband), the challenged intrusion will be exempt from usual Fourth Amendment standards only if it is limited to detecting the presence of that contraband and risks infringement upon no other privacy interest. *United States* v. *Jacobsen*, *supra*, 80 L.Ed.2d at 100-101; *United States* v. *Place*, *supra*, 462 U.S. at 707.

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[6] The State's suggestion that Officer McNamee could have seen the weapon under the front seat of respondent's car without physically intruding into the vehicle (Br. for Pet. at 24, 26) finds no support in the record. Nor did petitioner ever rely on this ground when the case was in the state courts. Obviously, had Officer McNamee seen the weapon from outside the vehicle, where he was entitled to be, respondent would have no cause to complain. *Texas* v. *Brown*, *supra*, 460 U.S. 730. But this is not such a case.

Thus, since Officer McNamee's intrusion meets the definition of a search, because it exposed areas in which respondent's privacy interests remained, the fact that Officer McNamee was looking for the VIN, an object in which respondent might have had minimal expectation of privacy, is constitutionally irrelevant.[7] Accordingly, the fact that the VIN contains information useful to law enforcement officials does not negate the Fourth Amendment's application to cases where the officer intrudes into a private vehicle to obtain that information. Nor does the fact that automobile manufacturers are required to place VINs in cars defeat a motorist's privacy interest against intrusions into his vehicle. As one distinguished commentator has written:

> [The argument] that entry of a vehicle to find the VIN is no search and thus is not "within the scope of the Fourth Amendment" is unsound. That form of police surveillance, it is submitted, should not go totally unregulated by constitutional restraints, for that would mean that police could enter any particular car on a whim and that they could make wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen. Such sur-

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[7] Indeed the State's own reasoning is self-defeating. Petitioner analogizes the VIN to a person's fingerprints, citing the lack of an expectation of privacy in either (Br. for Pet. at 20). Yet, in *Hayes* v. *Florida*, 470 U.S. ____, 84 L.Ed.2d 705 (1985), this Court analyzed the interference with a suspect's liberty under the Fourth Amendment, even though the purpose of his detention was merely to obtain his fingerprints, and found such detention unconstitutional under the standards articulated in *Terry* v. *Ohio*, 392 U.S. 1 (1968). As in *Hayes*, focus on the object of the search or seizure would beg the question of whether the intrusion to discover that object falls within and meets Fourth Amendment standards. Similarly, the State analogizes the VIN to one's license and registration (Br. for Pet. at 20-23). This logic would justify otherwise unconstitutional searches and seizures of a motorist simply because the intrusion was designed to locate these "public" papers.

> veillance intrudes upon a justified expectation of privacy and thus, as *Katz* v. *United States* [389 U.S. 347 (1967)] teaches, is subject to Fourth Amendment limitations.

W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.5, pp. 359-360 (1978).

The State notes that the VIN is often capable of being viewed from outside the car (Br. for Pet. at 18). Of course, to the extent a police officer can inspect a car's VIN in "plain view," without making a physical intrusion into the vehicle, no search occurs within the meaning of the Fourth Amendment. *Texas* v. *Brown*, *supra*, 460 U.S. 730.[8] Where, however, as the New York Court of Appeals decided in this case, the officer intrudes into a vehicle to discover information otherwise not available by a "plain view" inspection, he conducts a "search" governed by Fourth Amendment standards. *Simpson* v. *United States*, 346 F.2d 291, 294 (10th Cir. 1965); *State* v. *Moore*, 66 Hawaii 202, 659 P.2d 70, 72 (1983); *People* v. *Piper*, 101 Ill.App.3d 296, 427 N.E.2d 1361, 1364 (1981); *State* v. *Simpson*, 95 Wash.2d 170, 622 P.2d 1199, 1210 (1980); *see also State* v. *McGann*, 124 N.H. 101, 467 A.2d 571 (1983) (reaching this result based on the state constitution).[9]

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[8] Several of the lower court cases the State cites for the proposition that a VIN inspection is not a search (Br. for Pet. at 16-17) involve "plain view" examinations by a police officer from outside the vehicle, which clearly impinge on no legitimate expectations of privacy. *United States* v. *Zemke*, 457 F.2d 110 (7th Cir.), *cert. denied*, 406 U.S. 947 (1972); *State* v. *Cohn*, 284 So.2d 426 (Fla. Dist. Ct. App. 1973); and *People* v. *Brooks*, 405 Mich. 225, 274 N.W.2d 430 (1979).

[9] In many of the lower court cases cited by the State in which a VIN inspection has been held not to constitute a "search" (Br. for Pet. at 16-17), the courts ruled that the police conduct was not a search requiring probable cause, but nevertheless considered whether the police officer had a "legitimate" or "reasonable" basis to examine the VIN. *See United States* v. *Forrest*, 620 F.2d 446 (5th Cir. 1980); *United States* v. *Duckett*, 583 F.2d 1309 (5th Cir. 1978); *United States*

The State concedes that respondent had a legitimate expectation of privacy in the interior of his vehicle (Br. for Pet. at 20). The State further concedes that Officer McNamee entered the car and displaced papers on the dashboard to obtain information from the interior (*Id.* at 25-26). Finally, the State concedes that Officer McNamee's conduct constituted an "entry and search," albeit "limited," which exposed "a few locations near the floor of the car which might have otherwise remained unseen" (*Id.* at 30, 33). This Court considered it to be "nothing less than sheer torture of the English language" to characterize a frisk as being anything other than a "search" governed by the Fourth Amendment. *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968). Likewise, it is inconsistent with this Court's precedents and tortures the English language to suggest that Officer McNamee conducted anything other than a "search" within the Fourth Amend-

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v. *Brown*, 535 F.2d 424 (8th Cir. 1976); *United States* v. *Ware*, 457 F.2d 823 (7th Cir.), *cert. denied*, 409 U.S. 888 (1972); *United States* v. *Zemke*, *supra*, 457 F.2d 110; *United States* v. *Powers*, 439 F.2d 373 (4th Cir.), *cert. denied*, 402 U.S. 1011 (1971); *United States* v. *Johnson*, 431 F.2d 441 (5th Cir. 1970); *United States* v. *Graham*, 391 F.2d 439 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968); *Cotton* v. *United States*, 371 F.2d 385 (9th Cir. 1967); *People* v. *Brewer*, 112 Mich. App. 670, 317 N.W.2d 218 (1981); *Wood* v. *State*, 632 S.W.2d 734 (Tex. Crim. App. 1982); and *Shirley* v. *Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977). Thus, these cases do not stand for the proposition that the Fourth Amendment is inapplicable to VIN inspections; in fact, they implicitly support the contrary conclusion. There are relatively few cases involving intrusive VIN inspections which employ no Fourth Amendment criteria to determine whether the police procedure was permissible: *United States* v. *Kitowski*, 729 F.2d 1418 (11th Cir. 1984); *United States* v. *Wood*, 500 F.2d 681 (5th Cir. 1974); *United States* v. *Polk*, 433 F.2d 644 (5th Cir. 1970); *State* v. *Sedacca*, 252 Md. 207, 249 A.2d 456 (1969); and *People* v. *Valoppi*, 61 Mich. App. 470, 233 N.W.2d 41 (1975). Therefore, the State is inaccurate when it asserts that the holding of the New York Court of Appeals herein "reflects a minority view which conflicts with the weight of lower court authority considering the issue of VIN inspections" (Br. for Pet. at 16).

ment when he opened the car door, reached inside, and disturbed papers on the dashboard, to obtain information from within the vehicle.[10]

B. Officer McNamee Conducted An Unreasonable Search When, Lacking Probable Cause Or A Reasonable Suspicion That Respondent's Car Was Stolen, He Searched The Car For The VIN.

Under the Fourth Amendment, a search of private property without proper consent is unreasonable, except in certain carefully delineated situations, unless the officer has prior authorization in the form of a valid search warrant. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978). Because of an automobile's mobility, the complex scheme of regulations governing motor vehicles, and the lesser expectations of privacy the public holds with regard to private cars, an officer may search an automobile without a warrant, but the requirement of probable cause remains inviolate. *California* v. *Carney*, 471 U.S. ___, 85 L.Ed.2d 406 (1985); *United States* v. *Ross*, 456 U.S. 798, 809 (1982); *Carroll* v. *United States*, 267 U.S. 132 (1925).[11] As this Court emphasized in *Almeida-Sanchez*

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[10] None of the State's litany of hypothetical cases in which a police officer might be allowed to intrude into a private vehicle (Br. for Pet. at 7, 24-25) involve a situation in which a police officer's incursion into the car is prompted by a desire, as here, to probe for information, which is the *sine qua non* of a search. Moreover, these situations all involve exigent circumstances. *See Payton* v. *New York*, 445 U.S. 573, 590 (1980).

[11] The few narrow, carefully drawn exceptions to the rule barring the police from searching a vehicle except upon probable cause, none of which are relevant to the instant case, include the right of the police, as a protective measure and in accordance with standard procedures, to conduct an inventory search of a vehicle impounded after the motorist is arrested [*South Dakota* v. *Opperman*, 428 U.S. 364 (1976)], and, upon making a lawful custodial arrest of a motorist, to search the person's vehicle [*New York* v. *Belton*, 453 U.S. 454

v. *United States*, 413 U.S. 266, 269 (1973), the "automobile exception" to the warrant requirement, established in *Carroll*, did not "declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."

Even where the police officer's intrusion is deemed less than a "full-blown search," the Fourth Amendment still requires that the officer comply with the prohibition against unreasonable searches and seizures. To be justified under the Fourth Amendment, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the officer's] intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). The facts, moreover, must

> be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Id. at 21-22 (citations omitted); *see also United States* v. *Place*, 462 U.S. 696, 703 (1983) (mere fact that intrusion is deemed "minimal" does not negate requirement that police have a reasonable basis for intruding on protected Fourth Amendment interest).

These principles apply with no less force when the intrusion concerns motorists and automobiles, and where

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(1981)]. Contrary to the State's assertion (Br. for Pet. at 33), the "administrative search" doctrine articulated in such cases as *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) and *United States* v. *Biswell*, 406 U.S. 311 (1972) does not authorize a police officer lacking probable cause to search an ordinary motorist. *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973).

the intrusion constitutes less than a full-blown search. Thus, in *Delaware* v. *Prouse*, 440 U.S. 648, 662-663 (1979), this Court held that the Fourth Amendment affords substantial protection to a motorist's expectation of privacy:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry* v. *Ohio*, *supra*, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Accordingly, consistent with the Fourth Amendment, a police officer may stop a motorist and detain him to check his driver's license and the registration of the automobile only where the officer has an articulable and reasonable suspicion that the motorist is unlicensed, the automobile is not registered, or either the vehicle or an occupant is otherwise subject to seizure for a violation of the law. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663.

In reaching this result, the Court rejected Delaware's assertion that patrol officers should be subject to no constraints in deciding which vehicles they will stop because of the State's interest in discretionary spot checks as a way to ensure highway safety and because of the limited

intrusion such a procedure imposes on the public. *Id.* at 655. While fully acknowledging the state's "vital interest" in making sure that motorists and vehicles comply with the highway laws and regulations, *id.* at 658, the Court nonetheless concluded that, on the record before it, Delaware had failed to show that "the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." *Id.* at 659. Given the availability of less intrusive procedures, the Court was not convinced that stopping vehicles without articulable suspicion was justified. *Id.*

Similarly, in *Michigan* v. *Long*, 463 U.S. 1032 (1983), the Court held that, upon lawfully stopping a motorist, a police officer may conduct a limited "protective search" of the passenger compartment of the automobile if the officer has an objectively reasonable belief, based on specific and articulable facts, that the suspect is dangerous and may gain immediate control of weapons. *Id.* at 1051. In reaching this decision, the Court stressed that, whenever the police conduct an investigative stop, they are not authorized, *ipso facto*, to conduct an automobile search, as they would be authorized to do, under *New York* v. *Belton*, 453 U.S. 454 (1981), when they make a lawful custodial arrest. In an ordinary traffic stop, the police officer lacks an important justification for a search that exists in an arrest situation, *i.e.*, the need to preserve evidence. *Michigan* v. *Long*, *supra*, 463 U.S. at 1049 n. 14.

Emphatically, whether the police conduct is deemed to be a "full-blown search" or a lesser, constitutionally cognizable intrusion (analogous to *Terry*), a police officer may not intrude on a motorist's legitimate expectations of privacy where he lacks any reasonable basis, founded on specific and articulable facts, to support his action. The officer must, at a minimum, have some "quantum of individualized, articulable suspicion" to justify his intrusion on protected privacy interests and to satisfy the "reason-

ableness standard" of the Fourth Amendment. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 662; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976). This rule must not be eviscerated if "[t]he word 'automobile' is not [to become] a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 461-462 (1971) (plurality opinion).[12]

In arguing that no individualized factual basis need accompany a search of a car for the VIN, the State asks this Court to depart from its precedents requiring reasonable suspicion or probable cause whenever an officer probes a private space, exposing otherwise private information. In support of its argument that the fundamental requirement of individualized suspicion be abandoned, the State advances no justifications that have not already been fully considered in these precedents. Petitioner, for example, relies heavily on the reduced expectation of privacy within an automobile and the State's interest in "the pervasive regulatory scheme" as reasons to exempt a VIN inspection from Fourth Amendment dictates (Br. for Pet. at 21). However, these precise rationales were only considered sufficient to justify dispensing with the warrant requirement:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of automobiles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

California v. *Carney*, *supra*, 85 L.Ed.2d at 414. Moreover, the very regulatory interests cited by the State—

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[12] The instant case arose in a law enforcement setting, the precise situation where the Fourth Amendment's requirement of individualized suspicion is most applicable. *New Jersey* v. *T.L.O.*, 469 U.S. ____, 83 L.Ed.2d 720, 740 (1985) (Powell, J., concurring).

promoting public safety, ensuring the qualifications of vehicles and their operators, and ensuring compliance with licensing, registration, and inspection requirements (Br. for Pet. at 21-22) — were considered in *Prouse*, 440 U.S. at 658, as only sufficient to justify further reducing the probable cause requirement to reasonable suspicion. Thus, these rationales, which have already justified substantial departures from the Fourth Amendment's warrant requirement, cannot be invoked in new guise as cause to eliminate the mandate of an individualized quantum of suspicion.

Nor is generalized concern for law enforcement, arising from such a fact as the large automobile theft problem in the United States (Br. for Pet. at 23 n.*), a sufficient basis for the Court to ignore the imperatives of the Fourth Amendment. When it has been faced with other difficult law enforcement problems, such as during the Prohibition era [*Carroll*] or today, with the current law enforcement concern about illegal immigration [*see Almeida-Sanchez* v. *United States*, 413 U.S. 266, 276 (1973) (Powell, J., concurring)],[13] the Court has held steadfastly to the requirement that an officer may not be granted unbridled discretion in conducting a search. Therefore, none of the

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[13] Roving patrols operating under the authority of the United States Border Patrol may not stop an automobile unless the officers have specific and articulable facts reasonably warranting suspicion that the vehicle contains illegal aliens. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975). On the other hand, because stopping cars at fixed checkpoints shows a high degree of effectiveness in curtailing illegal immigration, the officials lack any less intrusive methods, and the use of this procedure avoids granting undue discretion to the officer in the field, Border Patrol officers are entitled to employ this procedure even where they lack individualized suspicion as to particular vehicles. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). Even at a fixed checkpoint, however, the Border Patrol may conduct a search only if the officers have probable cause. *United States* v. *Ortiz*, 422 U.S. 891 (1975).

State's arguments justify abandoning the minimal Fourth Amendment requirement that a police officer have individualized and reasonable suspicion in order to search an automobile.

Not only is the holding of the New York Court of Appeals in the instant case therefore consistent with the prior decisions of this Court, but the court's analysis also furthers the policies of the Fourth Amendment which this Court has discussed therein.

As in *Prouse*, the record here does not establish that law enforcement officers lack less intrusive methods to combat the problem of car theft which the State emphasizes. *Cf. United States* v. *Place*, 462 U.S. 696, 709 (1983); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 589 (1983); *Florida* v. *Royer*, 460 U.S. 491, 504-506 (1983) (White, J.); *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979). As the New York Court of Appeals held, the police officers could have acted under the authority of Vehicle & Traffic Law § 401 (McKinney 1984-1985) and demanded to see the VIN. Alternatively, they might have run a radio check on the vehicle's license plates through the computer network operated by the National Crime Information Center.[14] Since there is no demonstrably compelling justification for such a procedure, police officers should not be permitted to intrude on the physical integrity of private automobiles in order to inspect the VIN, where they lack any articulable suspicion that the vehicle in question has been stolen. If the police are permitted to intrude into the

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[14] As is well known, radio checks of license plates frequently enable law enforcement officials to identify stolen vehicles. *See, e.g., United States* v. *Matlock*, 558 F.2d 1328 (8th Cir.), *cert. denied*, 434 U.S. 872 (1977); *United States* v. *Jamerson*, 549 F.2d 1263 (9th Cir. 1977); *United States* v. *Harris*, 479 F.2d 508 (5th Cir. 1973); *United States* v. *Williams*, 440 F.2d 1235 (6th Cir.), *cert. denied*, 404 U.S. 837 (1971); *Commonwealth* v. *Evans*, ____ Pa. Super. ____, 494 A.2d 383 (1985); *State* v. *Green*, 680 S.W.2d 474 (Tenn. Crim. App. 1984).

passenger compartment of private automobiles in order to conduct VIN inspections without any articulable grounds, the number of motorists whose privacy will be violated merely to detect one single stolen car will be large indeed. *See Delaware* v. *Prouse*, *supra*, 440 U.S. at 660. Such widespread intrusions into a motorist's legitimate expectation of privacy violate the most fundamental policies of the Fourth Amendment.

The State's argument, moreover, would eviscerate the core of the Fourth Amendment: the need "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). Thus, in order to detect aliens, the stopping of vehicles without individual suspicion at fixed checkpoints is permitted, *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 559, but the same may not be done by roving patrols, *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 881. Similarly, officers may not exercise unbridled discretion in choosing which vehicles they will pull over for registration or license checks. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 655. Petitioner's claim that a police officer should be authorized to physically intrude into a private automobile to inspect the VIN, even where the officer has no articulable suspicion that the car is stolen, invites precisely the "standardless and unconstrained discretion" which this Court has vigorously condemned. *Id.* at 661.

The state courts found (A. 45-46, 50, 56, 59, 61), and petitioner concedes (Br. for Pet. at 32), that the police lacked probable cause or reasonable suspicion to believe that respondent's car was stolen or that it contained contraband. Indeed, Officer McNamee never voiced any reason for his intrusion. Nor did he do anything with the VIN once he found it, such as compare the number to other documents. Accordingly, regardless whether McNamee's

conduct is deemed a "full-blown search" requiring probable cause, as in *Carney* and *Ross*, or a lesser intrusion cognizable under the Fourth Amendment, as in *Long*, *Prouse*, and *Terry*, the officer's actions in opening the door, entering the car, and disturbing papers on the dashboard, in a search for the VIN, violated respondent's right to be free from unreasonable searches and seizures.

All the circumstances point to the conclusion that Officer McNamee, lacking any rules, guidelines, standard procedures or any other neutral criteria to justify his action, acted on no more than his own "hunch" or whim when he intruded into respondent's car to inspect the VIN. Indeed, as the highest court in New York held (A. 60), in intruding into the car without first asking respondent for the information he desired, Officer McNamee completely disregarded Vehicle & Traffic Law § 401, the rule the New York Legislature enacted to govern precisely this situation. McNamee's intrusion into the car must be seen for what it was: a wholly unjustified interference with respondent's constitutional right to personal autonomy and security, free from arbitrary violation by an agent of the State.

Recognizing that Officer McNamee had no factual basis for his intrusion into the car, the State seeks to impute to him Officer Meyer's knowledge that respondent lacked a driver's license (Br. for Pet. at 31). At the time he entered respondent's vehicle, Officer McNamee had no knowledge of this fact. Nevertheless, solely because McNamee's partner learned of respondent's unlicensed status simultaneous to McNamee's incursion into the car, the State insists that McNamee should be credited with this information. The essence of Fourth Amendment analysis, however, is that a police officer's conduct must be measured against the information he possesses at the time of his action. *Terry* v. *Ohio*, *supra*, 392 U.S. at 21-22. Only where a police officer relies on a directive from a fellow

officer or another law enforcement agency can he be credited with any information possessed by another. *Whitely* v. *Warden*, 401 U.S. 560, 568 (1971). This Court's decision in *United States* v. *Hensley*, 469 U.S. ____, 83 L.Ed.2d 604 (1985), on which the State relies, demonstrates that petitioner's argument is groundless. In *Hensley*, the Court held that police officers may rely on a "wanted" bulletin issued by another police department. 83 L.Ed.2d at 614. Thus, one officer's knowledge can be imputed to another officer only where there is a transmittal of information. Mere collective knowledge, without a transmittal of information or a specific directive, is insufficient. Accordingly, since McNamee acted entirely on his own, and did not delay his intrusion into the vehicle long enough to learn what respondent told his partner, any information his partner learned but did not transmit prior to the entry into the car cannot be imputed to McNamee.[15] Any contrary rule would make a mockery of Fourth Amendment analysis.

The State erroneously finds support in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), for its contention that a police officer, upon lawfully stopping a motorist for a traffic infraction, is entitled to intrude into the vehicle to inspect the VIN even if the officer lacks any reason to suspect the car is stolen (Br. for Pet. at 29). *Mimms*, however, is inapplicable for several important reasons.

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[15] The State's reliance on *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972) (Br. for Pet. at 31) is misplaced. In *Ragsdale*, the court based its conclusion on the fact that the officer who had the information would have had a duty to act as his partner did in searching the vehicle. *See* W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.5, pp. 631-634 (1978). In the instant case, the State has not shown that Officer Meyer, upon finding that respondent was unlicensed, had a duty to look at the VIN, or that he would have done so.

First, it was largely because of the "inordinate risk confronting an officer as he approaches a person seated in an automobile," *Mimms*, *supra*, 434 U.S. at 110, that the Court deemed it necessary to authorize a police officer to order a motorist out of his vehicle. This Court rightfully does not equate the ordinary law enforcement concerns present here — the discovery of the VIN for the purpose of enforcing a regulatory scheme or, at most, to recover stolen vehicles — with the imperative of protecting a police officer or the public from a possibly armed suspect.[16] Notably, in the instant case, Officer McNamee asserted no particular safety rationale in support of his search for the VIN in respondent's car.[17] Finally, in *Mimms* the officer lacked any less intrusive means to ensure his safety. In seeking to recover stolen vehicles, by contrast, an officer has many alternative procedures available to him. In *Mimms*, the Court stressed that the officer merely moved the situs of an already legal detention, and such intrusion hardly rises to the level of a "petty indignity." *Id.* at 111. In the instant case, by contrast, the State seeks authorization for police officers to turn a routine

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[16] *Cf. New York* v. *Quarles*, 467 U.S. ____, 81 L.Ed.2d 550, 557 (1984) (adopting an exception to the *Miranda* rule where necessary to protect the public against the dangers that arise when a gun is hidden in a supermarket); *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983) (distinguishing an officer's reasonable efforts to protect his own safety from a mere attempt to collect evidence); and *Terry* v. *Ohio*, *supra*, 392 U.S. at 27 (authorizing a police officer to frisk an individual whom he has reason to believe is armed and dangerous).

[17] The State simply is wrong in asserting that the decision of the New York Court of Appeals itself gives rise to some kind of danger for police officers (Br. for Pet. at 27). The Court of Appeals' decision does not require the officer to allow the motorist back into his vehicle, but, rather, merely suggests this as one constitutional option. Another constitutional option is to secure the motorist's consent. Where, as here, the officers had no fear for their safety, they could have chosen either option.

traffic stop into a search of the interior of the vehicle, which plainly involves an intrusion qualitatively different and more serious than that which occurred in *Mimms*. Indeed, *Mimms* ultimately supports our position that any further intrusion in the nature of a search *cannot* be made in the absence of articulable suspicion. The frisk in *Mimms* was only justified when the officer saw a bulge, thus creating a reasonable concern for safety. *Id.* at 112.

The rule that a police officer may not intrude on the physical integrity of a car's passenger compartment to inspect the VIN unless he has a reasonable belief, based on specific, articulable facts, that the car is stolen, fully satisfies this Court's requirements as to the fashioning of a Fourth Amendment standard to apply to a specific factual situation: (1) the standard is workable for application by rank and file, trained police officers; (2) the standard is reasonable, because when a police officer has no articulable grounds for suspicion, there is no probability that anything warrants investigation; and (3) the standard is objective, not based on the unfettered discretion of an individual police officer. *See Illinois* v. *Andreas*, 463 U.S. 765, 772-773 (1983).

In sum, Officer McNamee conducted a "search" governed by the Fourth Amendment when he intruded into respondent's vehicle in a quest for information contained therein which was not otherwise visible and where his intrusion exposed parts of the vehicle interior with respect to which a person has a legitimate expectation of privacy. Although the warrant requirement has been discarded with respect to automobiles, probable cause is still required whenever an officer conducts a search. Even where the intrusion amounts to less than a "full-blown search," an officer needs individualized suspicion with respect to the vehicle. The police may not exercise unfettered discretion to intrude on interests protected by the Fourth Amendment. An intrusion based on no more than

a mere unarticulable "hunch" is clearly illegal. Since Officer McNamee had neither probable cause nor reasonable suspicion, his intrusion into respondent's vehicle in search for the VIN violated the Fourth Amendment.

POINT III

PETITIONER'S CLAIMS, RAISED FOR THE FIRST TIME BEFORE THIS COURT, THAT (1) A MOTORIST LACKS A REASONABLE EXPECTATION OF PRIVACY IN A VEHICLE WHEN HE HAS NO LICENSE, AND (2) THE POLICE ARE ENTITLED TO SEARCH A MOTORIST'S VEHICLE WHENEVER THEY ARE AUTHORIZED TO PLACE THE PERSON UNDER ARREST FOR A TRAFFIC INFRACTION, ARE NOT PROPERLY OR ADEQUATELY PRESENTED FOR THIS COURT'S REVIEW AND, IN ANY EVENT, ARE MERITLESS.

As the State concedes (Br. for Pet. at 34 n.*), prior to the time this Court granted *certiorari*, petitioner had never raised in the state courts its present assertions that (1) a motorist lacks a reasonable expectation of privacy in a vehicle when and simply because he is unlicensed, and (2) the police were entitled to search respondent's vehicle simply because they *could* have arrested him for a traffic infraction. These legal claims were not presented to, passed on by, or developed in, the New York courts, and thus are not properly presented at this time. In any event, even if this Court reaches these contentions, it should reject them as lacking merit.

A. Petitioner May Not Raise In This Court Legal Issues That Were Not Presented To, Passed On By, Or Factually Developed In, The State Courts.

A long-standing rule of this Court bars review of questions urged by a petitioner or appellant that were not presented to or passed on by the lower courts. Because of "due regard for the appropriate relationship of this Court to state courts," this rule applies with particular force

with respect to cases that come before this Court from a state court. *McGoldrick* v. *Compagnie Generale*, 309 U.S. 430, 434 (1940). The rule against considering a question not pressed or passed on below has been described as being jurisdictional in nature. *See Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981); *Hill* v. *California*, 401 U.S. 797, 805-806 (1971); *State Farm Mutual Automobile Insurance Co.* v. *Duel*, 324 U.S. 154, 160 (1945).

This Court has consistently applied the "not pressed or passed on" rule to bar the State from raising legal grounds to rebut a defendant's Fourth Amendment claim where those grounds had not been presented to, passed on by, or developed in, the lower courts. For instance, in *Steagald* v. *United States*, 451 U.S. 204, 209 (1981), the Court refused to entertain a "standing" claim proffered by the government which had not been developed in the lower courts. In *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983), the Court held that it could not consider whether there is a "good faith" exception to the exclusionary rule where petitioner, the State of Illinois, had failed to raise this argument in the state courts, and the state courts had not passed on the question. Likewise, in *Hayes* v. *Florida*, 470 U.S. ___, 84 L.Ed.2d 705, 709 n.1 (1985), the Court held that it could not reach the State's argument, never raised in the state courts, that the inevitable discovery exception to the exclusionary rule was applicable to the Fourth Amendment issue presented. As in *Steagald*, *Gates* and *Hayes*, the Court should not address the new issues the State raises in this Court.

This Court has articulated three reasons why, in a case such as this, review of legal contentions first raised in this Court is improper: (1) general federalism concerns require that the state courts be given the first chance to consider the constitutionality of the actions of state officials; (2) requiring the State first to raise its claim in the state courts enables those courts to rest their deci-

sions on adequate and independent grounds in state law; and (3) when a legal argument was not raised below, the record is likely to be inadequate because the facts were not developed with a view toward resolving such an issue. *Illinois* v. *Gates*, *supra*, 462 U.S. at 221-222; *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). These three considerations apply with special force in this case.

Federalism concerns weigh heavily against considering petitioner's legal contentions that were not previously presented to the state courts. Surely, the New York courts are no less concerned than this Court about enforcement of the laws on New York highways. Indeed, since licensing statutes are clearly within the realm of state regulatory interests, the state courts should have the first opportunity to address the consequences of noncompliance with their own state regulations. Likewise, policies as to whether a particular traffic infraction merits a full arrest and search are particular concerns of the state courts and legislatures. Ordinary concerns for the proper relationship between state and federal courts require that novel claims, such as those petitioner seeks to raise, first be asserted in the state courts.

Similarly, the need to allow the state courts the opportunity first to consider adequate and independent state grounds counsels against this Court's consideration of these claims for the first time. As we show in Point I, *ante*, the New York Court of Appeals, since *People* v. *Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967), has consistently held that New York law bars the police from conducting a search, upon stopping a motorist for a routine traffic infraction, unless there are independent grounds to justify such an intrusion. A New York statute [Vehicle & Traffic Law § 401] governs how officers may obtain the VIN and other documentation from a stopped motorist (A. 60). The New York Court of Appeals has previously held that, under the New York Constitution, the "search

incident to arrest" doctrine is more restrictive on police officers than its analogue under the Fourth Amendment, as construed in *New York* v. *Belton*, 453 U.S. 454 (1981). Under New York law, a police officer needs a specific factual basis to justify the search of an arrestee, and there must be a temporal and spatial nexus between the arrest and the search. *People* v. *Gokey*, 60 N.Y.2d 309, 312, 457 N.E.2d 723 (1983); *People* v. *Smith*, 59 N.Y.2d 454, 458, 452 N.E.2d 1224 (1983). Had petitioner raised its "no expectation of privacy" and "search incident to arrest" claims below, the New York Court of Appeals might well have rejected them based on state law. Surely, where state law already substantially controls a question, this Court should be most reluctant to reach out and decide an issue never previously presented to the state courts.[18]

Moreover, under the procedural rules of the New York Court of Appeals, petitioner would have been barred from presenting its present claims to the New York Court of Appeals, as it had failed to raise them in the lower state courts. *See People* v. *Johnson*, 64 N.Y.2d 617, 619 n.2, 474 N.E.2d 241 (1984) (State cannot urge on appeal theory of brief, limited inquiry, where its claim in the lower court

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[18] The State concedes that, since *Marsh*, the New York Court of Appeals has construed New York law as it relates to the issues raised in this Court but which petitioner never asserted in the state courts (Br. for Pet. at 44 n.*). Since New York law already bars an officer from routinely conducting a search upon making an arrest, petitioner misreads New York law in suggesting that the New York Court of Appeals has left "unresolved" the question of whether an officer may conduct a search incident to a mere traffic stop (Br. for Pet. at 44 n.*). If New York law prohibits an officer from conducting a search routinely upon a full custodial arrest, it is illogical to suppose that an officer would be authorized to take such action upon a mere traffic stop. The only apparent reason why petitioner would fail to raise, in the state courts, a legal issue on which those same courts have already spoken extensively is that petitioner expected the state courts to hold in favor of respondent based on New York law.

was that investigative seizure was justified based on reasonable suspicion); *People* v. *Dodt*, 61 N.Y.2d 408, 416, 462 N.E.2d 1159 (1984) (where State argued in trial court that police had probable cause to arrest defendant, State cannot then urge on appeal that no arrest took place because defendant voluntarily accompanied the police to the station). Thus, had the State raised its new claims when the case was before the New York Court of Appeals, an adequate and independent procedural bar in New York law would have barred that court from reaching these propositions. *See Webb* v. *Webb*, *supra*, 451 U.S. at 498 n.4; *Wainwright* v. *Sykes*, 433 U.S. 72, 86-87 (1977).

Because petitioner never raised its new legal contentions in any of the three state courts which addressed the propriety of the search in this case, the factual record was not developed in such a manner as to permit evaluation of petitioner's claims. As to the State's claim concerning respondent's status as an unlicensed motorist, the record is clearly inadequate. The record establishes only that respondent had no driver's license the day he was stopped by Officers Meyer and McNamee. In fact, the judge who presided at respondent's suppression hearing barred the prosecutor from inquiring whether respondent ever had a license (A. 36), because it was not relevant to any legal issue asserted by the State in the courts below. It is pure speculation to suggest that respondent *never* had a license and, therefore, was an unsafe driver who had to be taken off the road (Br. for Pet. at 35). It may have been that respondent's license simply expired the day before the police officers stopped him, that he had a license renewal application pending, or that his license was lost, misplaced, or stolen. Since these factual possibilities could affect, if not defeat, petitioner's legal claim and policy arguments concerning the "unlicensed" motorist, petitioner's claim cannot properly be addressed.

The factual record is equally inadequate to permit evaluation of the State's claim that the police should have been permitted to search respondent's vehicle simply because they could have arrested him for speeding. As the State's claim is based, in part, on the assertion that the officers' failure to arrest respondent for his traffic infractions was "merely fortuitous" and that they only "hesitated" to effect a full custodial arrest in this case, the factual record is insufficiently developed. There was, simply, no evidence that respondent would have been arrested, quickly or otherwise, merely because the officers observed him driving 5 to 10 miles per hour above the speed limit. Nor was there any testimony that respondent would have been placed under arrest simply because he was driving a car with a cracked windshield and did not have a driver's license. There is no evidence that this was New York Police Department policy or practice, or the routine practice of the officers who stopped respondent. Indeed, to the extent the record was developed as to this issue, it clearly does not help the State's argument. Respondent was merely given a summons for two infractions. The most likely scenario is that, had Officer McNamee not entered the car and found a gun, the officers would have permitted respondent to proceed on his way. *See People* v. *Marsh*, 20 N.Y.2d 98, 102, 228 N.E.2d 783, 786 (1967) ("[T]he statutory scheme does not contemplate treating [the motorist] as a common criminal to be booked, photographed, fingerprinted and jailed.").

The claims the State now desires to raise in this Court are especially inappropriate for consideration without discussion below because they require determinations regarding state licensing requirements and state practices concerning arrests for routine traffic infractions. It would be particularly inappropriate for this Court to consider these arguments without an opportunity for the state courts first to consider definitive questions of under-

lying state law that, in view of the extensive development of New York law as to these general matters, may render academic any federal question.[19]

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[19] The cases petitioner cites in support of its assertion that its claims are properly presented for this Court's review (Br. for Pet. at 34 n.*) are inapposite. In both *Illinois* v. *Gates*, 462 U.S. 213 (1983), and *Steagald* v. *United States*, 451 U.S. 204 (1981), the Court held it could *not* reach the Fourth Amendment arguments the state sought to raise, as they had not been asserted or factually developed below, precisely the situation here. In *Wilson* v. *Cook*, 327 U.S. 474 (1946), the Court held it could not reach an issue that was neither presented to nor decided by the state court. Even though the question sought to be raised in this Court was related in some way to the one presented to the state court, and even though it arose under the same implied federal immunity from state taxation, the argument was not properly before the Court because it was distinct from the question decided by the state court. *Id.* at 483. The same rule requires the Court to refrain from deciding the two new issues the State seeks to raise in the instant case. Although both issues arise under the Fourth Amendment, they are clearly distinct from the narrow questions presented to, and decided by, the New York Court of Appeals. In *Raley* v. *Ohio*, 360 U.S. 423 (1959), the argument in the lower courts was a due process claim arising from a state agency's failure to instruct a witness to answer or else be held in contempt. When the case came before this Court, the petitioners contended that they relied on positive assurances that their Fifth Amendment privilege was available. The Court permitted this claim to be raised because it was "only a variation" of the former theme, which was put into sharper focus by the Ohio Supreme Court's theory of decision. *Id.* at 437 n.12. Here, by contrast, petitioner proposes entirely new theories, never advanced before. Moreover, this case does not involve a sharpening of focus of arguments considered by the state courts because the State never gave those courts the opportunity to pass on the contentions sought to be raised here. Since the record in the instant case is inadequate to permit resolution of the new issues the State wishes to raise, these issues are not properly before the Court. *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). Under this Court's precedents, thus, it is plainly not enough that the issue before this Court involves the same general constitutional provision (*i.e.*, the Fourth Amendment) that was addressed in state court. *Cf. Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972). The concurring opinion in

A final reason this Court should refrain from reaching the additional claims the State now raises is that they were not presented in its petition for a writ of *certiorari*. *See* Supreme Court Rules 21.1(a) and 34.1(a). For all the foregoing reasons, this Court should decline to address the arguments raised in Points I.C. and I.D. of petitioner's brief.

B. On The Merits, The State's Assertion That An Unlicensed Motorist Lacks A Reasonable Expectation Of Privacy In A Vehicle He Lawfully Possesses Is Incorrect.

Although petitioner styles its claim in terms that avoid the word "standing,"[20] the State's contention reduces itself to the assertion that a motorist has no standing to assert the violation of his Fourth Amendment rights simply because he lacks a driver's license. This assertion should be soundly rejected as lacking any basis in logic or precedent.

The State's contention that an unlicensed motorist lacks standing to assert a violation of his Fourth Amendment rights arising from a search of his car is fundamentally flawed. Under the precedents of this Court, a determination as to standing looks to whether the litigant is in

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Fuller v. *Oregon*, 417 U.S. 40, 58 (1974) (Douglas, J., concurring), on which the State relies, relates to a case in which one Justice, in dissent, is criticized for raising an issue "substantially different" from one that had previously been developed in the state courts. Finally, *Scott* v. *United States*, 436 U.S. 128 (1978), simply is not a case where a party raised an issue in this Court that had not been raised below.

[20] Petitioner's reluctance to cast its argument in "standing" terms may arise from this Court's holding, in *Steagald* v. *United States*, 451 U.S. 204, 209 (1981), that the government may not raise a "standing" argument in this Court for the first time. As in *Steagald*, although the grounds for the State's "expectation of privacy" claim existed at the time of the suppression hearing, this contention was never asserted until the case came before this Court.

lawful possession of the object which is searched, and whether he asserts his own right to be free from unreasonable searches and seizures. *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978). Notably, the State concedes that respondent was in lawful possession of the car when he was stopped by the police (Br. for Pet. at 37). Therefore, under established law, respondent crossed the basic threshold of "standing" to assert a violation of his Fourth Amendment rights arising from Officer McNamee's search of the vehicle. Yet, the State urges that, although a person has lawful possession of the chattel in question, his ability to assert his Fourth Amendment rights can be defeated solely by virtue of the way in which such chattel is used. The State cites not a single case which supports this novel proposition.

Indeed, the single hypothetical cited by the State illustrates the absence of any justification for the doctrine petitioner proposes. If a car thief lacks standing to assert a Fourth Amendment violation arising from a search of the stolen car (Br. for Pet. at 36), that is because his possession of the vehicle, *ab initio*, is unlawful. Thus, as a threshold matter, since such a person had no lawful possession of the chattel, he has no right to litigate any invasion of privacy with respect to it. By contrast, a motorist, irrespective of his licensed status, has an established possessory interest, and thus has legitimate expectations of privacy, in the vehicle.

Nor is there any logic to the State's assertion that respondent lost his expectations of privacy by turning on the ignition and driving down the highway (Br. for Pet. at 37-38). The State's contention rests on two assumptions: first, that when respondent commenced driving the vehicle, he had to expect that he would commit an act which would give rise to a lawful stop of his car by the police; and second, that, upon being stopped, respondent "had" to have known that the police would search his vehicle (Br.

for Pet. at 35-36). Based on these assumptions, the State retrospectively concludes that respondent had no expectation of privacy when he first commenced operation of the vehicle. Not only is this argument unacceptably attenuated, but it also rests on pure speculation. There is no evidence that respondent had reason to believe that he would be stopped. Moreover, the fact that he closed the door of his car when he got out to talk with the police officers indicates that respondent had a clear expectation of privacy with respect to the vehicle's interior. Finally, the State cannot reasonably assert that respondent "had" to have known that his vehicle would eventually be searched. In fact, on this record, there is every reason to believe that the officers here would merely have issued respondent a summons and would have allowed him to proceed, had Officer McNamee not entered the car and found a weapon. *See People* v. *Howell*, 49 N.Y.2d 778, 779, 403 N.E.2d 182 (1980) (arrest is neither called for nor preferred procedure when motorist is stopped for reckless driving, a misdemeanor). The State cites no evidence in support of its assertion (Br. for Pet. at 35) that the police would, in fact, have placed respondent under arrest for his traffic infractions alone.[21] Nor does the State

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[21] Notably absent from this record is any support for the State's contention (Br. for Pet. at 35, 37) that any "presumption" of danger arises with regard to unlicensed motorists, which would presumably lend support to petitioner's assertion that the police officers necessarily would have taken respondent into custody on this ground alone. In New York, driving without a license is classified as a violation, for which a fine from $100 to $200 may be levied. New York Vehicle & Traffic Law § 509 (McKinney Supp. 1984-1985). There is no basis to assert, as does the State, that a driver who simply lacks a license can be compared to a person who attempts to drive while intoxicated (Br. for Pet. at 35 n.*). The extreme hazard posed by intoxicated motorists is such that one cannot conceive of a conscientious police officer permitting such a driver to proceed on his way. *See Welsh* v. *Wisconsin*, 466 U.S. ____, 80 L.Ed.2d 732, 746-747 (1984) (Blackmun, J., concurring).

advance any support, statistical or otherwise, for its contention that the vehicle would have been searched.

Mere unlawful use of chattel cannot defeat a person's previously attached, threshold entitlement to assert a violation of his Fourth Amendment rights to such chattel. Such unlawful use is relevant only to the subsequent determination of the ultimate Fourth Amendment claim. Thus, for instance, unlawful operation of a vehicle might lead to consequences under a state's regulatory statutes or penal laws, or, if a police officer knows of such a violation, the officer's knowledge may be considered in assessing the reasonableness of the officer's intrusion. The same rule applies in other settings. A person in lawful possession of premises, even if those premises are used illegally, has the right to insist that the police abide by the requirements of the Fourth Amendment when they intrude upon his possessory and privacy interests therein. While the illegal use of premises, if known by the police, may itself serve as a justification for a police intrusion on such premises, the mere fact of such illegal use is not sufficient to deprive the person of his threshold right to challenge the reasonableness of the intrusion under the Fourth Amendment. What the State suggests in the instant case is that a person, solely because of his illegal use of given property, could not complain of a Fourth Amendment violation, even where the police defy legal processes and do so without any knowledge of the illegal use.

The logical extension of a "standing" doctrine that turns on a person's illegal use of property he lawfully possesses illustrates the bankruptcy of the doctrine itself. For example, a person who is in lawful possession of premises, whose lawful possession thereof gives him an expectation of privacy therein, an invasion of which he has a right to litigate under the existing precedents of this Court, would lose standing solely on the ground that such premises are used illegally, such as for gambling [*McDonald* v. *United*

States, 335 U.S. 451 (1948)] or narcotics [*Johnson* v. *United States*, 333 U.S. 10 (1948)], or in violation of some local zoning, licensing, labor or health regulation. Ultimately, the State's contention is that a person who has an established possessory or privacy interest in property loses standing to challenge an invasion of such interests merely on the assumption that he must expect that his unlawful use of his property *might* come to light. This contention suggests that anyone who violates the law lacks standing to object to any violation of his rights under the Fourth Amendment.

The simple fact that a motorist lacks the same degree of privacy in his automobile that a person has within his own home, *cf. South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976), in no way supports the State's assertion that a motorist lawfully in possession of an automobile, who merely lacks a driver's license, forfeits all expectation of privacy, as might someone who has already been tried, sentenced and imprisoned for a criminal offense, such as a prisoner [*Hudson* v. *Palmer*, 468 U.S. ____, 82 L.Ed.2d 393 (1984)] or an escaped convict [*United States* v. *Roy*, 734 F.2d 108 (2d Cir. 1984)] (Br. for Pet. at 36-37). The State's contention is entirely lacking in merit.

In sum, the State has no support in logic or precedent for its claim that unlawful use of property defeats established possessory and privacy rights therein. Once a possessory interest and expectation of privacy is established, the threshold criterion of standing is met. Unlawful use of chattel is then relevant to the substantive Fourth Amendment analysis, but does not operate to deprive the lawful possessor of his already vested entitlement to challenge an invasion of his possessory interest in such chattel. A contrary result would create a wholesale exception to this Court's standing doctrine for anyone whose use of chattel is in technical violation of the law. Such cannot possibly be the case if the Constitution is to have any continuing

vitality in a world where regulatory statutes cover nearly every aspect of modern life.

C. On The Merits, The "Search Incident To Arrest" Doctrine Does Not Apply Where The Police, Although Authorized To Arrest A Motorist For A Traffic Infraction, Do Not Take Such Action.

The State's assertion that a police officer is entitled to conduct a search of an automobile whenever he is authorized to make an arrest, but does not take such action, is fundamentally flawed because it seeks to have this Court create a "search incident to possible arrest" doctrine. Such a doctrine finds no support in the history or sound policies of the Fourth Amendment. Rather, the State seeks to turn the narrow "search incident to arrest" doctrine on its head and apply it to a situation where none of the justifications for the doctrine exist.

In *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), this Court explained the rationale behind the "search incident to arrest" doctrine as follows:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Similarly, in *New York* v. *Belton*, 453 U.S. 454, 457 (1981), the Court wrote that the "search incident to arrest" doctrine adopted in *Chimel* v. *California*, 395 U.S. 752 (1969), provides "that a lawful custodial arrest creates a situation which justifies the contemporaneous search" of the arrestee.

One rationale for the "search incident to arrest" doctrine is the fact that, once a person is placed under arrest, that person retains little further expectation of privacy. *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977). This rationale is inapplicable to a case where, as here, the person is not placed under arrest. Other reasons for the doctrine are the need to "disarm the suspect in order to take him into custody," *United States* v. *Robinson*, *supra*, 441 U.S. at 234, and to prevent the suspect from escaping, *Abel* v. *United States*, 362 U.S. 217, 236 (1960). These reasons are equally inapplicable to the instant case, for there is no suggestion or evidence that Officers Meyer and McNamee were ever in danger, or that they had any intention to arrest respondent for his traffic infractions. A final justification for the "search incident to arrest" doctrine is the need to preserve evidence, which, as this Court recently held, is inapplicable in an ordinary investigative stop such as occurred in the instant case. *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983).

Moreover, to the extent the State relies on "the risks inherent in a traffic stop" as a basis for authorizing a "protective search of the vehicle" incident to a traffic stop (Br. for Pet. at 42), petitioner ignores the significance of *Michigan* v. *Long*, *supra*, 463 U.S. 1032. There, the Court authorized such a protective search only where there was a factual basis for the officer to fear for his safety. (Here, of course, there is no such evidence.) Thus, by implication, the mere fact of the traffic stop is insufficient to justify an intrusion into the vehicle.

Because of the narrow and limited nature of the "search incident to arrest" doctrine, for this rule to apply there must first be a lawful custodial arrest: "a search incident to a lawful arrest may not precede the arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U.S. 40, 67 (1968); *see also People* v. *Evans*, 43 N.Y.2d 160,

164-166, 371 N.E.2d 528, 531-532 (1977); *People* v. *Erwin*, 42 N.Y.2d 1064, 369 N.E.2d 1170 (1977).

It bears repetition (*see* Point I, *ante*) that, in New York, an arrest for an ordinary traffic violation such as the ones respondent committed in this case is anything but a foregone conclusion. In *People* v. *Howell*, 49 N.Y.2d 778, 779, 403 N.E.2d 182 (1980), the New York Court of Appeals wrote that the trial court

> was in error in its conclusion that merely because reckless driving is a misdemeanor rather than a traffic violation, the arrest was inevitable. An arrest in a situation such as was presented in this case was neither called for nor the preferred procedure.

If an arrest would not necessarily ensue in a case where the motorist has committed the misdemeanor of reckless driving, surely petitioner overstates its case in asserting that it was "merely fortuitous" (Br. for Pet. at 38) that the officers did not arrest respondent for having committed the traffic infractions of driving a car without a license and operating a vehicle with a cracked windshield, neither of which is even classified as a misdemeanor in New York. New York Vehicle & Traffic Law §§ 155, 375(22), 509(1) (McKinney Supp. 1984-1985). Neither inevitable nor "preferred" in New York, an arrest in the instant case was highly unlikely, as the officers did not even issue respondent a summons for a speeding violation [New York Vehicle & Traffic Law § 1180 (McKinney Supp. 1984-1985)] or claim that they would have arrested him for either of the two remaining violations.

Since the police did not arrest respondent for his traffic infractions, and there is no reason, either based on established practice or on this record, to assume they would have done so, the "search incident to arrest" doctrine is inapplicable. Applying the doctrine to cases in which the police are authorized to arrest a citizen for a petty offense, but they neither take nor intend to take such action,

would grant the police power to conduct searches in a limitless array of situations, thus substantially negating the public's right to be free from unreasonable searches and seizures. Adoption of the doctrine proposed by the State would thus lead to the illogical result of the police having power to search property belonging to citizens stopped for any number of petty offenses that the police themselves deem unworthy of an arrest.

The "search incident to arrest" doctrine is a limited, narrowly defined, exception to the general rule that prohibits a search in the absence of a warrant issued upon probable cause. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978). There is no cause to expand the doctrine to a situation where, as here, none of its justifications exist.

CONCLUSION

For the reasons stated in Point I, the writ should be dismissed. In the alternative, for the reasons stated in Points II and III, the judgment should be affirmed.

Respectfully submitted,

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EDITOR'S NOTE

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NO. 84-1181 (8)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

BENIGNO CLASS,

Respondent.

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On Writ of Certiorari to the Court of Appeals

of the State of New York

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the judgment of the New York Court of Appeals was based on adequate and independent state grounds where the court's opinion was expressly predicated on the state constitution and relied on a long line of that court's prior search and seizure rulings.

2. Whether Officer McNamee violated respondent's Fourth Amendment right to be free from unreasonable searches and seizures when, upon stopping respondent's car for a traffic infraction and lacking any reason to believe that the car was stolen, he opened the door, entered the vehicle, reached inside, and moved papers on the dashboard, in order to search for the vehicle identification number.

3. Whether petitioner's claims, raised for the first time before this Court, that (1) a motorist lacks a reasonable expectation of privacy in a vehicle when he has no license, and (2) the police are entitled to search a motorist's vehicle whenever they are authorized to place the person under arrest for a traffic infraction, are not properly or adequately presented for this Court's review and, in any event, are meritless.

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POINT I

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POINT II

OFFICER McNAMEE VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, UPON STOPPING RESPONDENT'S CAR FOR A TRAFFIC INFRACTION AND LACKING ANY REASON TO BELIEVE THAT THE CAR WAS STOLEN, HE OPENED THE DOOR, ENTERED THE VEHICLE, REACHED INSIDE, AND MOVED PAPERS ON THE DASHBOARD, IN ORDER TO SEARCH FOR THE VEHICLE IDENTIFICATION NUMBER (VIN).

A. When Officer McNamee opened the door of respondent's car and entered it to look for the VIN, and thus exposed private areas not otherwise visible, he conducted a search governed by the Fourth Amendment.

B. Officer McNamee conducted an unreasonable search when, lacking probable cause or a reasonable suspicion that respondent's car was stolen, he searched the car for the VIN.

POINT III

PETITIONER'S CLAIMS, RAISED FOR THE FIRST TIME BEFORE THIS COURT, THAT (1) A MOTORIST LACKS A REASONABLE EXPECTATION OF PRIVACY IN A VEHICLE WHEN HE HAS NO LICENSE, AND (2) THE POLICE ARE ENTITLED TO SEARCH A MOTORIST'S VEHICLE WHENEVER THEY ARE AUTHORIZED TO PLACE THE PERSON UNDER ARREST FOR A TRAFFIC INFRACTION, ARE NOT PROPERLY OR ADEQUATELY PRESENTED FOR THIS COURT'S REVIEW AND, IN ANY EVENT, ARE MERITLESS.

A. Petitioner may not raise in this Court legal issues that were not presented to, passed on by, or factually developed in, the state courts.

B. On the merits, the State's assertion that an unlicensed motorist lacks a reasonable expectation of privacy in a vehicle he lawfully possesses is incorrect.

C. On the merits, the "search incident to arrest" doctrine does not apply where the police, although authorized to arrest a motorist for a traffic infraction, do not take such action.

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TABLE OF AUTHORITIES

Cases: Page:

Abel v. United States, 362 U.S. 217 (1960)

Almeida-Sanchez v. United States, 413 U.S. 266 (1973)

Brown v. Texas, 443 U.S. 47 (1979)

California v. Carney, ___ U.S. ___, 85 L.Ed.2d 406 (1985)

Cardinale v. Louisiana, 394 U.S. 437 (1969)

Carroll v. United States, 267 U.S. 132 (1925)

Chimel v. California, 395 U.S. 752 (1969)

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)

Colorado v. Nunez, ___ U.S. ___, 79 L.Ed.2d 338 (1984)

Commonwealth v. Reid Evans, ___ Pa. Super. ___
___ A.2d ___ (slip opinion 4/19/85)

Coolidge v. New Hampshire, 403 U.S. 443 (1971)

Cotton v. United States, 371 F.2d 385 (9th Cir. 1967)

Delaware v. Prouse, 440 U.S. 648 (1979)

Dewey v. Des Moines, 173 U.S. 193 (1899)

Draper v. United States, 358 U.S. 307 (1959)

Florida v. Casal, 462 U.S. 637 (1983)

Florida v. Royer, 460 U.S. 491 (1983)

Fuller v. Oregon, 417 U.S. 40 (1974)

Hayes v. Florida, 470 U.S. ___, 84 L.Ed.2d 705 (1985)

Herb v. Pitcairn, 324 U.S. 117 (1945)

Hill v. California, 401 U.S. 797 (1971)

Hudson v. Palmer, 468 U.S. ___, 82 L.Ed.2d 393 (1984)

Illinois v. Andreas, 463 U.S. 765 (1983)

Illinois v. Gates, 462 U.S. 213 (1983)

Johnson v. United States, 333 U.S. 10 (1948)

Katz v. United States, 389 U.S. 347 (1967)

Maine v. Thornton, 466 U.S. ___, 80 L.Ed.2d 214 (1984)

McDonald v. United States, 335 U.S. 451 (1948)

McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940)

Michigan v. Long, 463 U.S. 1032 (1983)

Mincey v. Arizona, 437 U.S. 385 (1978)

New Jersey v. T.L.O., 469 U.S. ___, 83 L.Ed.2d 720 (1985)

New York v. Belton, 453 U.S. 454 (1981)

New York v. Quarles, ___ U.S. ___, 81 L.Ed.2d 550 (1984)

Ohio v. Johnson, ___ U.S. ___, 81 L.Ed.2d 425 (1984)

Payton v. New York, 445 U.S. 573 (1980)

Pennsylvania v. Mimms, 434 U.S. 106 (1977)

People v. Belton, 55 N.Y.2d 49, 432 N.E.2d 745 (1982)

People v. Brewer, 112 Mich. App. 670, 317 N.W.2d 218 (1981)

People v. Brooks, 405 Mich. 225, 274 N.W.2d 430 (1979)

People v. Class, 63 N.Y.2d 491, 472 N.E.2d 1009 (1984)

People v. Class, 97 A.D.2d 741, 468 N.Y.S.2d 892 (1st Dept. 1983)

People v. Cruz, 34 N.Y.2d 362, 314 N.E.2d 39 (1974)

People v. David L., 56 N.Y.2d 698, 436 N.E.2d 1324, cert. denied, 459 U.S. 866 (1982)

People v. Dodt, 61 N.Y.2d 408, 462 N.E.2d 1159 (1984)

People v. Elwell, 50 N.Y.2d 231, 406 N.E.2d 471 (1980)

People v. Erwin, 42 N.Y.2d 1064, 369 N.E.2d 1170 (1977)

People v. Evans, 43 N.Y.2d 160, 371 N.E.2d 528 (1977)

People v. Gokey, 60 N.Y.2d 309, 457 N.E.2d 723 (1983)

People v. Howell, 49 N.Y.2d 778, 403 N.E.2d 182 (1980)

People v. Johnson, 64 N.Y.2d 617, 474 N.E.2d 241 (1984)

People v. Long, 419 Mich. 636, 359 N.W.2d 194 (1984)

People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982)

People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783 (1967)

People v. Miller, 43 N.Y.2d 789, 373 N.E.2d 286 (1977), aff'g 52 A.D.2d 425, 385 N.Y.S.2d 457 (1st Dept. 1976)

People v. Perel, 34 N.Y.2d 462, 315 N.E.2d 452 (1974)

People v. Piper, 101 Ill.App.3d 296, 427 N.E.2d 1361 (1981)

People v. Smith, 59 N.Y.2d 454, 452 N.E.2d 1224 (1983)

People v. Sullivan, 29 N.Y.2d 69, 272 N.E.2d 464 (1971)

People v. Troiano, 35 N.Y.2d 476, 323 N.E.2d 183 (1974)

People v. Valoppi, 61 Mich. App. 470, 233 N.W.2d 41 (1975)

People v. Weintraub, 35 N.Y.2d 351, 320 N.E.2d 636 (1974)

Rakas v. Illinois, 439 U.S. 128 (1978)

Raley v. Ohio, 360 U.S. 423 (1959)

Scott v. United States, 436 U.S. 128 (1978)

Shirley v. Commonwealth, 218 Va. 49, 235 S.E.2d 432 (1977)

Sibron v. New York, 392 U.S. 40 (1968)

Simpson v. United States, 346 F.2d 291 (10th Cir. 1965)

South Dakota v. Opperman, 428 U.S. 364 (1976)

Spinelli v. United States, 393 U.S. 410 (1969)

Stanley v. Illinois, 405 U.S. 645 (1972)

State v. Casal, 410 So.2d 152 (Fla. 1982)

State v. Cohn, 284 So.2d 426 (Fla. Dist. Ct. App. 1973)

State v. Green, 680 S.W.2d 474 (Tenn. Crim. App. 1984)

State v. McGann, 124 N.H. 101, 467 A.2d 571 (1983)

State v. Moore, 66 Hawaii 202, 659 P.2d 70 (1983)

State v. Sedacca, 252 Md. 207, 249 A.2d 456 (1969)

State v. Simpson, 95 Wash.2d 170, 622 P.2d 1199 (1980)

State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945)

Steagald v. United States, 451 U.S. 204 (1981)

Terry v. Ohio, 392 U.S. 1 (1968)

Texas v. Brown, 460 U.S. 730 (1983)

United States v. Biswell, 406 U.S. 311 (1972)

United States v. Brignoni-Ponce, 422 U.S. 873 (1975)

United States v. Brown, 535 F.2d 424 (8th Cir. 1976)

United States v. Chadwick, 433 U.S. 1 (1977)

United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978)

United States v. Forrest, 620 F.2d 446 (5th Cir. 1980)

United States v. Graham, 391 F.2d 439 (6th Cir.), cert. denied, 393 U.S. 941 (1968)

United States v. Harris, 479 F.2d 508 (5th Cir. 1973)

United States v. Hensley, 469 U.S. ___, 83 L.Ed.2d 604 (1985)

United States v. Jacobsen, 466 U.S. ___, 80 L.Ed.2d 85 (1984)

United States v. Jamerson, 549 F.2d 1263 (9th Cir. 1977)

United States v. Johnson, 431 F.2d 441 (5th Cir. 1970)

United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530 (1984)

United States v. Kitowski, 729 F.2d 1418 (11th Cir. 1984)

United States v. Knotts, 460 U.S. 276 (1983)

United States v. Martinez-Fuerte, 428 U.S. 543 (1976)

United States v. Matlock, 558 F.2d 1328 (8th Cir.), cert. denied, 434 U.S. 872 (1977)

United States v. Ortiz, 422 U.S. 891 (1975)

United States v. Place, 462 U.S. 696 (1983)

United States v. Polk, 433 F.2d 644 (5th Cir. 1970)

United States v. Powers, 439 F.2d 373 (4th Cir.), cert. denied, 402 U.S. 1011 (1971)

United States v. Ragsdale, 470 F.2d 24 (5th Cir. 1972)

United States v. Robinson, 414 U.S. 218 (1973)

United States v. Ross, 456 U.S. 798 (1982)

United States v. Roy, 734 F.2d 108 (2d Cir. 1984)

United States v. Villamonte-Marquez, 462 U.S. 579 (1983)

United States v. Ware, 457 F.2d 828 (7th Cir), cert. denied, 409 U.S. 888 (1972)

United States v. Williams, 440 F.2d 1235 (6th Cir.), cert. denied, [redacted] 404 U.S. 837 (1971)

United States v. Wood, 500 F.2d 681 (5th Cir. 1974)

United States v. Zemke, 457 F.2d 110 (7th Cir.), cert. denied, 406 U.S. 947 (1972)

Wainwright v. Sykes, 433 U.S. 72 (1977)

Webb v. Webb, 451 U.S. 493 (1981)

Welsh v. Wisconsin, 466 U.S. ___, 80 L.Ed.2d 732 (1984)

Whitely v. Warden, 401 U.S. 560 (1971)

Wilson v. Cook, 327 U.S. 474 (1946)

Wood v. State, 632 S.W.2d 734 (Tex. Crim. App. 1982)

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)

Constitutional and Statutory Provisions:

United States Constitution, Amendment IV

United States Code, Title 28, Section 1257(3)

United States Supreme Court, Rule 21.1(a)

United States Supreme Court, Rule 34.1(a)

New York Constitution, Article I, Section 12

New York City Traffic Regulations §60(a)

New York Penal Law §70.02(5)(b) (McKinney Supp. 1984-1985)

New York Penal Law §265.02(4) (McKinney Supp. 1984-1985)

New York Vehicle & Traffic Law §155
(McKinney Supp. 1984-1985)

New York Vehicle & Traffic Law §375
(McKinney Supp. 1984-1985)

New York Vehicle & Traffic Law §401
(McKinney Supp. 1984-1985)

New York Vehicle & Traffic Law §509
(McKinney Supp. 1984-1985)

New York Vehicle & Traffic Law §1180
(McKinney Supp. 1984-1985)

Other Authorities:

Black's Law Dictionary (5th Ed. 1979)

Galie, State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978, 28 Buffalo L. Rev. 157 ←(1979)

W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (1978)

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257(3). Respondent maintains that the Court lacks jurisdiction because the judgment of the New York Court of Appeals was based on adequate and independent state grounds (see Point I, post).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The New York Constitution, Article I, Section 12, provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

During the afternoon of May 11, 1981, Police Officers Lawrence Meyer and William McNamee were on routine patrol. They observed respondent driving a 1972 Dodge Charger with a cracked windshield 5 to 10 miles an hour over the speed limit, a speed

Officer McNamee deemed "too high for the streets."[1] The officers pulled respondent over in a routine traffic stop (Meyer: A. 11-13, 16; McNamee: A. 21-23).

Respondent parked his car at the side of the road; Officer Meyer parked his vehicle directly behind it. Respondent exited his car, closed the door, and joined Officer Meyer at the rear of respondent's vehicle. Respondent gave Meyer the car's registration and insurance papers, but informed Meyer that he had no driver's license (Meyer: A. 12, 15).[2] Meanwhile, Officer McNamee, unaware of respondent's lack of a license, walked over to respondent's car and opened the door on the driver's side in order to locate the vehicle identification number (VIN) (Meyer: A. 12, 15-17; McNamee: A. 21, 24, 26-27). While McNamee searched for the VIN, respondent continued speaking with Officer Meyer (McNamee: A. 26-27).

Officer McNamee opened the door of respondent's car. He first looked, unsuccessfully, for the VIN on the door panel, and then on the dashboard. A piece of paper on the dashboard prevented him from inspecting the VIN from outside the car. To see the number, McNamee reached inside the vehicle and moved the

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1. Officer Meyer testified that respondent was traveling at a speed of 35 or 40 miles an hour (A. 13). Since the standard speed limit within New York City is 30 miles per hour [New York City Traffic Regulations §60(a)], the dissenting Justice in the Appellate Division and the entire Court of Appeals found that respondent was proceeding at a speed 5 to 10 miles per hour over the speed limit (A. 49, 55, 61).

2. At the suppression hearing, respondent answered "No" to the prosecutor's question whether "[o]n that day, [he was] a licensed operator." The judge presiding at the hearing precluded further inquiry into whether respondent ever had a driver's license (A. 36).

paper. The officer testified that, while doing so, he looked down and saw a gun handle sticking out from under the front seat of the car (McNamee: A. 21, 25-26). Respondent later admitted that the gun belonged to him (Class: A. 36)

Officer McNamee provided no explanation for his desire to inspect the VIN. Neither did Officers McNamee or Meyer ever voice any suspicion that respondent's car was stolen. Indeed, there was no testimony that the officers ran a radio check on respondent's vehicle to determine whether it had been reported stolen.[3] McNamee, the officer who searched for the VIN, was not in possession of the vehicle's registration or insurance card. Nor did he, upon finding the VIN, check the number against anything or copy it down so he could compare it to these documents (McNamee: A. 25-27). Indeed, neither officer claimed to have checked the VIN against anything else. Notably, there was no testimony that Officer McNamee's search for the VIN was required by any standard police procedures or regulations.

Once Officer McNamee found the gun, he showed it to Meyer, who then arrested respondent for possession of the weapon. The officers also gave respondent a summons for being an unlicensed driver and for driving a car with a cracked windshield (Meyer: A. 17-19). Respondent was neither arrested for the two traffic infractions nor even issued a summons for speeding. Nor was there any testimony that he would have been arrested for the

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3. In fact, as the State concedes (Br. for Pet. at 37), the car was not stolen. It belonged to respondent's brother-in-law (Class: A. 32). Everything in the car's documentation was in order (McNamee: A. 28).

traffic infractions had he not been arrested for possession of the gun.

In its ruling denying respondent's motion to suppress the gun, the court specifically found that "there was no reason to believe the vehicle [respondent] was driving was stolen" (A. 45). The court nonetheless concluded that Officer McNamee's actions were "reasonable and prudent under the circumstances." This finding was based on two facts: respondent's conduct in exiting his vehicle and walking over to the police, and respondent's lack of a driver's license, which was not then known to McNamee (A. 45-46).

After the court denied his suppression motion, respondent pleaded guilty to criminal possession of a weapon in the third degree. New York Penal Law §265.02(4) (McKinney Supp. 1984-1985). Although this crime is a felony in New York, respondent was sentenced only to a five year term of probation, after the court found the existence of mitigating circumstances. New York Penal Law §70.02(5)(b) (McKinney Supp. 1984-1985). In 1984, respondent was discharged from probation.

Respondent appealed the judgment of conviction, contending that the police violated his right, under both the New York and United States Constitutions, to be free from unreasonable searches and seizures, when Officer McNamee entered respondent's car to inspect the VIN without having any reason to believe that the car was stolen. The New York Supreme Court, Appellate Division, affirmed the judgment without opinion (A. 48-49). People v. Class, 97 A.D.2d 741, 468 N.Y.S.2d 892 (1st Dept.

1983). Justice John Carro dissented, writing that respondent's conduct did not create any suspicion sufficient to justify Officer McNamee's intrusion into the car (A. 49-51).

Respondent then appealed to the New York Court of Appeals, which, by a 5 to 2 decision, reversed the order of the Appellate Division, granted respondent's motion to suppress, vacated his guilty plea, and dismissed the indictment (A. 53). People v. Class, 63 N.Y.2d 491, 472 N.E.2d 1009 (1984). In an opinion written by Judge Judith Kaye, the court held that Officer McNamee violated respondent's rights, under the New York Constitution and the Fourth Amendment, to be free from unreasonable searches and seizures when he entered respondent's car to search for the VIN.

First, the court held that Officer McNamee's nonconsensual entry into respondent's car to view the VIN constituted a search (A. 57). Second, the court recognized both the governmental interest in VIN inspections and the fact that such inspections usually entail a "lesser invasion of privacy than a full-blown search" (A. 58). Although the court suggested that these factors might justify a requirement of less than probable cause, it concluded that they could not justify completely eliminating the constitutional requirement of a factual predicate for the search. Thus, since Officer McNamee possessed neither probable cause nor any reason to believe that respondent's car was stolen, his entry into the vehicle was unconstitutional (A. 56-59). Third, the court rejected the State's argument that the "public nature" of a VIN negates any expectation of privacy. The court explained that the requirement that manufacturers place VINs on vehicles "does not automatically sanction police intrusion into private space"

in order to read the number (A. 58). The court further held that New York Vehicle & Traffic Law §401 (McKinney Supp. 1984-1985), which permits a police officer to demand of a motorist information necessary to identify the vehicle and owner, does not authorize an officer to intrude into a private vehicle in order to obtain such information. Rather, the statute authorizes police officers only to demand information of a motorist, and requires the motorist to provide it (A. 60).

In dissent, Judge Hugh R. Jones argued that there was no expectation of privacy with respect to a VIN, and concluded that an officer is entitled to enter a vehicle to inspect the VIN upon lawfully stopping a motorist for a traffic infraction (A. 61-63).

Throughout the litigation of this case in the New York courts, the State has asserted, as the sole basis for upholding Officer McNamee's entry into respondent's vehicle, that a police officer, upon stopping any motorist for a routine traffic infraction, has the right to intrude into the car to inspect the VIN, even if the officer lacks any reason to believe that the car is stolen. Now petitioner contends, for the first time, that (1) an unlicensed motorist lacks a legitimate expectation of privacy in his vehicle, and (2) a police officer may search the passenger compartment of a vehicle whenever he is authorized to arrest a motorist for a traffic violation even if he does not, in fact, make an arrest (Br. for Pet. at 34 n.*). As these issues were never previously raised, the state courts had no occasion to rule on them.

SUMMARY OF ARGUMENT

1. The judgment of the New York Court of Appeals rested on an adequate and independent ground in state law: the court specifically held that state law -- Vehicle & Traffic Law §401 (McKinney Supp. 1984-1985) -- did not authorize the police conduct at issue and that Article I, Section 12, of the New York Constitution, which protects the public against unreasonable searches and seizures, prohibited it. The New York constitutional provision has its own well-established identity, independent of the Fourth Amendment. Therefore, the judgment of the Court of Appeals is beyond this Court's review because it rested on an adequate and independent ground in state law. Michigan v. Long, 463 U.S. 1032, 1041-1042 (1983).

The New York Court of Appeals' reliance on New York law on this point is clear from the face of its opinion. Since its decision in People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783 (1967), the New York Court of Appeals has held that, as a matter of state constitutional law, a search of a motorist or his vehicle may not be predicated upon a motorist's commission of an ordinary traffic infraction. In the instant case, the court relied on Marsh and its progeny to support its conclusion that Officer McNamee violated respondent's right to be free from unreasonable searches and seizures, as guaranteed by the New York Constitution, by entering his vehicle to inspect the VIN.

2. Since Officer McNamee neither suspected, nor had reason to believe, that the car was stolen, his entry into respondent's car violated respondent's right to be free from unreasonable searches and seizures.

Officer McNamee's entry into respondent's vehicle for the purpose of looking for the VIN constituted a "search" within the meaning of the Fourth Amendment because the officer intruded upon respondent's legitimate and reasonable expectations of privacy when he entered the vehicle, revealing information contained within the car that he could not have ascertained without making the intrusion. United States v. Jacobsen, 466 U.S. ___, 80 L.Ed.2d 85, 94 (1984).

As a general rule, an officer may not search the interior of an automobile unless he has probable cause. United States v. Ross, 456 U.S. 798 (1982). Nor may an officer engage in a lesser intrusion upon a motorist's expectation of privacy in a vehicle unless he has an objectively reasonable basis, founded on specific and articulable facts, to do so. Michigan v. Long, 463 U.S. 1032 (1983); Delaware v. Prouse, 440 U.S. 648 (1979); Terry v. Ohio, 392 U.S. 1 (1968). Since Officer McNamee possessed neither probable cause nor any articulable basis for his action, such as a belief that respondent's car was stolen, he violated the Fourth Amendment when he intruded into the car.

3. Because the State's claims were neither asserted in the state courts nor passed on below, this Court should not consider the State's present assertions that (1) an unlicensed motorist lacks a legitimate expectation of privacy in his vehicle, and (2) a police officer may search the passenger compartment of a vehicle whenever he is authorized to arrest the motorist for a traffic infraction, even where the officer does not arrest or intend to arrest the motorist (Br. for Pet. at 34 n.*). Illinois v.

Gates, 462 U.S. 213, 221-224 (1983).

In any event, these arguments should be rejected because they lack precedent and justification and would negate the substantial protections afforded by the Fourth Amendment. First, petitioner's "unlicensed motorist" theory ignores the fact that a driver has a legitimate expectation of privacy in a vehicle lawfully in his possession, which gives him standing to litigate the constitutionality of any intrusion therein. Rakas v. Illinois, 439 U.S. 128, 139 (1978). Second, petitioner's reliance on the "search incident to arrest" doctrine is misplaced. Although the police could have placed respondent under arrest solely on account of his traffic infractions, they did not do so and there is no basis to believe they would have done so. Moreover, the "search incident to arrest" doctrine is premised on the minimal expectation of privacy that survives after an officer makes an arrest, the police officer's need to protect himself and prevent his prisoner from escaping, and the need to preserve evidence. Therefore, the doctrine is simply inapplicable in a case where, as here, the officers merely stop a motorist for an ordinary traffic infraction and make the arrest only after conducting their search and based solely on the evidence seized as a result of that search. Sibron v. New York, 392 U.S. 40, 67 (1968).

ARGUMENT

POINT I

THE JUDGMENT OF THE NEW YORK COURT OF APPEALS WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS WHERE THE COURT'S OPINION WAS EXPRESSLY PREDICATED ON THE STATE CONSTITUTION AND RELIED ON A LONG LINE OF THAT COURT'S PRIOR SEARCH AND SEIZURE RULINGS.

Because of limitations on its jurisdiction and in view of the rule against rendering advisory opinions, this Court has no power to review judgments of state courts that rest on adequate and independent state grounds. In order "scrupulously to observe the long standing rule [against reviewing] a judgment of a state court that rests on an adequate and independent ground in state law," this Court can decide a case only where the result was mandated by federal law. Herb v. Pitcairn, 324 U.S. 117, 125-128 (1945).

In Michigan v. Long, 463 U.S. 1032, 1041-1042 (1983), the Court reiterated the rule against reviewing judgments of state courts that rest on adequate and independent state grounds. However, for cases where "the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court adopted a "plain statement" rule, requiring the state court to make it clear that it relied on federal cases only as persuasive authority. Id. at 1040-1041. In the instant case, because the adequacy and independence of the state ground is clear from the face of the state court's opinion, the "plain statement" rule adopted in Long does not apply. Accordingly, the judgment of the New York Court of Appeals is beyond this Court's power of review.

The New York Court of Appeals held that New York Vehicle & Traffic Law §401 (McKinney Supp. 1984-1985) does not authorize, and the New York Constitution forbids, a police officer's action, upon stopping a motorist for a routine traffic infraction, in opening and entering the car to inspect the VIN. In the very first sentence of its opinion, the court expressly cited Article I, Section 12, of the New York Constitution as a basis for holding that Officer McNamee violated respondent's right to be free from unreasonable searches and seizures (A. 55). In addition to that explicit invocation of the state constitution, the court made it plain that its judgment flowed from its own prior rulings in a host of cases: People v. David L., 56 N.Y.2d 698, 436 N.E.2d 1324, cert. denied, 459 U.S. 866 (1982); People v. Miller, 43 N.Y.2d 789, 373 N.E.2d 286 (1977), aff'g 52 A.D.2d 425, 385 N.Y.S.2d 457 (1st Dept. 1976); People v. Perel, 34 N.Y.2d 462, 315 N.E.2d 452 (1974); People v. Cruz, 34 N.Y.2d 362, 314 N.E.2d 39 (1974); People v. Sullivan, 29 N.Y.2d 69, 272 N.E.2d 464 (1971); and People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783 (1967). Of these decisions, David L., Perel, and Cruz all expressly rely on the New York Constitution.

The foundation for the ruling of the New York Court of Appeals in the instant case is People v. Marsh, supra, 20 N.Y.2d 98, 228 N.E.2d 783, in which that court first held that, upon stopping a motorist for an ordinary traffic infraction, a police officer is not entitled to search the motorist. On its face, Marsh was based on state law. Before even mentioning the state or federal constitution, Chief Judge Fuld wrote for the court

that the New York Legislature never authorized police officers to conduct a search merely upon stopping a motorist for a routine traffic violation. In cases of routine traffic violations, New York law authorizes a police officer to issue a summons to a motorist in lieu of making an arrest. Indeed, in New York City it is customary to do so. Id. at 100-101, 228 N.E.2d at 785. As it is neither the necessary nor the usual procedure in New York to arrest a motorist for a routine traffic violation, an officer may not search the motorist

> unless, when the vehicle is stopped, there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction.

Id. at 101, 228 N.E.2d at 786.

One rationale for this rule is that, quite simply, evidence of an ordinary traffic infraction is not to be found inside the vehicle. Id. at 101, 228 N.E.2d at 785. Additionally, the court reasoned that "[a] motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity . . . ." Id. at 101, 228 N.E.2d at 786. The Court of Appeals further held that a search is not authorized even where an arrest warrant had been issued on account of the motorist's violation of the traffic laws. The court wrote:

> [T]he statutory scheme does not contemplate treating [the motorist] as a common criminal to be booked, photographed, fingerprinted and jailed. It is equally degrading -- and most assuredly not the Legislature's intention -- to subject him to the affront of a search when one is not necessary for the proper execution of the warrant. In short, no search for a weapon is authorized as incident to an arrest for a traffic infraction,

> regardless of whether the arrest is made on the scene or pursuant to a warrant, unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime.

Id. at 102, 228 N.E.2d at 786.

It is beyond doubt that the rule established by the Court of Appeals in Marsh is soundly based on state law. In People v. Perel, 34 N.Y.2d 462, 468, 315 N.E.2d 452, 456 (1974), which the court also cited in the instant case (A. 57), the Court of Appeals confirmed that Marsh held, as a matter of state law, that a search may be unreasonable upon an arrest for particular offenses.[4] Indeed, the State concedes as much in its brief before this Court (Br. for Pet. at 44 n.*). Only in the penultimate paragraph of its Marsh opinion, after establishing that the New York Legislature never authorized the police to conduct a search incident to an arrest for a routine traffic violation, did the court consider whether this rule was required by the state or federal constitution. Moreover, when it did so, the court's citation to the relevant constitutional provisions made it plain that the result was dictated by the state

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4. In People v. Weintraub, 35 N.Y.2d 351, 353, 320 N.E.2d 636, 637 (1974), the Court of Appeals reiterated that its holding in Marsh was based on legislative policy as well as on the federal and state constitutional guarantees against unreasonable searches and seizures. Moreover, the rule the Court of Appeals established in Marsh survives as a matter of state law, notwithstanding this Court's decision in United States v. Robinson, 414 U.S. 218 (1973). People v. Troiano, 35 N.Y.2d 476, 479, 323 N.E.2d 183, 186 (1974) (Rabin, J., concurring). See generally Galie, State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978, 28 Buffalo L. Rev. 157, 166-173 (1979).

constitution, as well as the federal constitution: "Indeed, this conclusion is also dictated by the constitutional prohibition against 'unreasonable searches and seizures'. (U.S. Const., 4th Amdt; N.Y. Const., art. I, §12)." People v. Marsh, 20 N.Y.2d at 102, 228 N.E.2d at 786 (citations omitted).

Having already decided in Marsh that New York law prohibits a police officer from searching a motorist stopped for a routine traffic violation, it logically followed that the Court of Appeals would hold, in the instant case, that a police officer may not intrude into a motorist's vehicle to search for the VIN where the officer lacks any reason to believe that the car is stolen.

Indeed, the court's analysis of the relevant statutory and constitutional provisions in the instant case closely parallels that in Marsh. As it did in Marsh, the Court of Appeals looked to the state statute, and the relevant legislative intent, to determine whether state law authorized the police conduct at issue. As in Marsh, the court found that it did not. The court reasoned that New York Vehicle & Traffic Law §401, which gives police officers the right to demand information, could not be construed as authorizing a search for that information, whether it be a search of the motorist or of his vehicle (A. 59-60). Moreover, as in Marsh, when addressing the constitutional question, the court explicitly declared that such a search violated the state, as well as federal, protections against unreasonable searches and seizures (A. 55).

The conclusion that the judgment of the New York Court of Appeals in the instant case was based on adequate and independent

state grounds is reinforced by that court's long tradition of interpreting the New York Constitution generously in favor of the public's right to be free from unreasonable searches and seizures.[5] For instance, in People v. Elwell, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477 (1980), the New York Court of Appeals held that the New York Constitution goes beyond this Court's holdings in Spinelli v. United States, 393 U.S. 410 (1969), and Draper v. United States, 358 U.S. 307 (1959), as to the corroboration required to sustain a warrantless search or arrest based on an informant's tip. Likewise, in the area of vehicle searches, the Court of Appeals has interpreted Article I, Section 12, of the New York Constitution in a manner different than this Court had interpreted the Fourth Amendment. See People v. Belton, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982); People v. Gokey, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724 (1983); People v. Smith, 59 N.Y.2d 454, 457-459, 452 N.E.2d 1224, 1227 (1983).

The ample state grounds relied upon here serve to distinguish the instant case from Michigan v. Long, 463 U.S. 1032 (1983). There, this Court held that a state court decision which

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5. The mere fact that Article I, Section 12, of the New York Constitution contains the same language as the Fourth Amendment in no way prevents the New York provision from being interpreted to provide greater protection to the public's right to be free from unreasonable searches and seizures than would the Federal Constitution. Sibron v. New York, 392 U.S. 40, 60-61 (1968); People v. Belton, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982). In light of the court's express reliance on state constitutional and statutory law, the fact that the court also cited the Fourth Amendment and federal cases does not negate the conclusion that the judgment is based on adequate and independent state grounds. See State v. Casal, 410 So.2d 152 (Fla. 1982), writ dismissed as improvidently granted sub nom. Florida v. Casal, 462 U.S. 637 (1983).

"relied exclusively on [federal caselaw]" and cited "[n]ot a single state case" in support of the result was not based on adequate and independent state grounds. Id. at 1043 (emphasis in original). Indeed, an inspection of the Michigan Supreme Court's decision in People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982), reveals that the result turned entirely on that court's analysis of this Court's holding in Terry v. Ohio, 392 U.S. 1 (1968). In this case, by contrast, the New York Court of Appeals cited ample state grounds to support its analysis and result. In Long, the defendant never raised his state law claim until his case was before this Court. People v. Long, 419 Mich. 636, 359 N.W.2d 194, 200 (1984) (on remand). By contrast, in the instant case respondent maintained, throughout his appeals in the state courts, that McNamee's intrusion into his vehicle violated both state and federal law.

This Court's cases since Long reinforce the conclusion that the judgment of the New York Court of Appeals in the instant case rests on adequate and independent state grounds. In Ohio v. Johnson, ___ U.S. ___, 81 L.Ed.2d 425, 432 n.7 (1984), this Court held that, where the syllabus to the state court's opinion, the only portion on which the entire state court had to agree, referred to the prohibition against double jeopardy without expressly invoking the state's double jeopardy provision, the judgment did not rest on adequate and independent state grounds. Here, by contrast, in the first sentence of its opinion the state court expressly relied on Article I, Section 12, of the New York Constitution, which protects the public against unreasonable

searches and seizures (A. 55). Similarly, unlike the state court opinion in Maine v. Thornton, 466 U.S. ___, 80 L.Ed.2d 214, 222 n.5 (1984), the New York Court of Appeals relied on the state constitution and cases which were firmly based on state law. Like Colorado v. Nunez, ___ U.S. ___, 79 L.Ed.2d 338, 341 (1984), the instant case involves a situation where the state court based its judgment on its own prior cases [e.g., People v. Marsh] which in turn were founded on state law. In a case where, as here, the decision sought to be reviewed rests on both state and federal grounds, either of which are dispositive, this Court lacks jurisdiction. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). The writ should therefore be dismissed.

POINT II

OFFICER McNAMEE VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, UPON STOPPING RESPONDENT'S CAR FOR A TRAFFIC INFRACTION AND LACKING ANY REASON TO BELIEVE THAT THE CAR WAS STOLEN, HE OPENED THE DOOR, ENTERED THE VEHICLE, REACHED INSIDE, AND MOVED PAPERS ON THE DASHBOARD, IN ORDER TO SEARCH FOR THE VEHICLE IDENTIFICATION NUMBER (VIN).

As a general rule, a police officer violates the Fourth Amendment when he searches a vehicle without probable cause. Any constitutionally cognizable intrusion into a vehicle, moreover, even if it is not deemed a "full-blown search," is impermissible unless the officer has an objectively reasonable basis, founded on specific and articulable facts, to support such action. Where a police officer opens the door of and enters, thus disturbing the motorist's papers within, a private automobile to search for the VIN, without any individualized suspicion, the officer violates the motorist's right to be free from unreasonable searches and seizures.

A. When Officer McNamee opened the door of respondent's car and entered it to look for the VIN, and thus exposed private areas not otherwise visible, he conducted a search governed by the Fourth Amendment.

Under the Fourth Amendment, a police officer conducts a "search" when he infringes upon "an expectation of privacy that society is prepared to consider reasonable." United States v. Jacobsen, 466 U.S. ___, 80 L.Ed.2d 85, 94 (1984). The word "search" means a prying into hidden places in an effort to discover objects or information not open to view. Black's Law Dictionary 1211 (5th Ed. 1979). It is this very common sense

notion that has animated the Court's rulings in this area. When a police officer, as here, opens the door of a private automobile and enters the car to probe for information, and thereby exposes areas otherwise inaccessible to view, he conducts a search that must meet the requirements of the Fourth Amendment.

As a threshold matter, it is well-established that, despite the special nature of an automobile, a motorist has some legitimate expectation of privacy within the interior of a car. See Delaware v. Prouse, 440 U.S. 648, 662-663 (1979). The State concedes as much (Br. for Pet. at 20). As in any case where government agents intrude upon legitimate expectations of privacy, their action must be measured against the requirements of the Fourth Amendment.

In determining whether a police officer conducts an intrusion into an area in which there is a legitimate expectation of privacy, and thus must comply with the requirements of the Fourth Amendment, the standard this Court has consistently articulated considers whether the officer exposes areas or information to which he otherwise would not have access. Thus, the placement of a "beeper" on an automobile to monitor a person's movements on the road is not a search, as it exposes nothing but openly visible, public conduct as to which one accordingly lacks any expectation of privacy. United States v. Knotts, 460 U.S. 276, 282 (1983). Or, when an officer peers into the interior of a private automobile from outside the vehicle, even if he is aided by a flashlight, the officer conducts no search, as he merely views that which would be visible to "inquisitive passersby" and as to which one therefore could not

reasonably entertain any expectation of privacy. Texas v. Brown, 460 U.S. 730, 739-740 (1983). Similarly, where an intrusion can be so limited that no personal information is exposed, but only contraband is detected, there is no search within the Fourth Amendment. United States v. Place, 462 U.S. 696, 707 (1983) (canine sniff); United States v. Jacobsen, supra, 80 L.Ed.2d at 100-101 (chemical test of drugs).

Applying these precedents, it is indisputable that Officer McNamee conducted a "search" when he opened the door of respondent's car and entered the vehicle in an effort to inspect the VIN. The information McNamee sought, by the officer's own testimony, could not have been discovered without making a physical intrusion into respondent's vehicle (McNamee: A. 21, 25). Moreover, McNamee's investigative procedure was not so limited as to expose only the mere presence of "contraband" (here, by analogy, the VIN), as his intrusion enabled him to view anything respondent may have placed in the front part of the vehicle. Indeed, the State concedes that Officer McNamee conducted a "limited entry and search" into respondent's vehicle, which had the "effect of presenting to police view a few locations near the floor of the car which might have otherwise remained unseen" (Br. for Pet. at 14, 29, 30, 33). Thus, McNamee's intrusion into the car may have been "less intrusive than a full-scale search but it [did] reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained." United States v. Karo, 468 U.S. ___, 82

L.Ed.2d at 541-542 (1984).[6]

While conceding that an individual retains an interest of privacy within his vehicle (Br. for Pet. at 20, 24, 47), the State asserts that the pertinent and dispositive fact is respondent's lack of expectation of privacy in the VIN itself, and that the "special nature and purpose of the VIN" requires that Fourth Amendment standards be ignored (id. at 18). Such a proposition stands Fourth Amendment analysis on its head, as it ignores the specific constitutional protection attaching to the situs of the intrusion ["persons, houses, . . . and effects"], and looks solely to the nature of the object sought to be discovered. Indeed, this Court has held that, even where there is no expectation of privacy in the object of discovery (such as contraband), the challenged intrusion will be exempt from usual Fourth Amendment standards only if it is limited to detecting the presence of that contraband and risks infringement upon no other privacy interest. United States v. Jacobsen, supra, 80 L.Ed.2d at 100-101; United States v. Place, supra, 462 U.S. at 707.

Thus, since Officer McNamee's intrusion meets the definition of a search, because it exposed areas in which respondent's privacy interests remained, the fact that Officer McNamee was looking for the VIN, an object in which respondent might have had

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6. The State's suggestion that Officer McNamee could have seen the weapon under the front seat of respondent's car without physically intruding into the vehicle (Br. for Pet. at 24, 26) finds no support in the record. Nor did petitioner ever rely on this ground when the case was in the state courts. Obviously, had Officer McNamee seen the weapon from outside the vehicle, where he was entitled to be, respondent would have no cause to complain. Texas v. Brown, supra, 460 U.S. 730. But this is not such a case.

minimal expectation of privacy, is constitutionally irrelevant.[7] Accordingly, the fact that the VIN contains information useful to law enforcement officials does not negate the Fourth Amendment's application to cases where the officer intrudes into a private vehicle to obtain that information. Nor does the fact that automobile manufacturers are required to place VINs in cars defeat a motorist's privacy interest against intrusions into his vehicle. As one distinguished commentator has written:

> [The argument] that entry of a vehicle to find the VIN is no search and thus is not "within the scope of the Fourth Amendment" is unsound. That form of police surveillance, it is submitted, should not go totally unregulated by constitutional restraints, for that would mean that police could enter any particular car on a whim and that they could make wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen. Such surveillance intrudes upon a justified expectation of privacy and thus, as Katz v. United States [389 U.S. 347 (1967)] teaches, is subject to Fourth Amendment limitations.

W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.5, pp. 359-360 (1978).

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7. Indeed the State's own reasoning is self-defeating. Petitioner analogizes the VIN to a person's fingerprints, citing the lack of an expectation of privacy in either (Br. for Pet. at 20). Yet, in Hayes v. Florida, ___ U.S. ___, 84 L.Ed.2d 705 (1985), this Court analyzed the interference with a suspect's liberty under the Fourth Amendment, even though the purpose of his detention was merely to obtain his fingerprints, and found such detention unconstitutional under the standards articulated in Terry v. Ohio, 392 U.S. 1 (1968). As in Hayes, focus on the object of the search or seizure would beg the question of whether the intrusion to discover that object falls within and meets Fourth Amendment standards. Similarly, the State analogizes the VIN to one's license and registration (Br. for Pet. at 20-23). This logic would justify otherwise unconstitutional searches and seizures of a motorist simply because the intrusion was designed to locate these "public" papers.

The State notes that the VIN is often capable of being viewed from outside the car (Br. for Pet. at 18). Of course, to the extent a police officer can inspect a car's VIN in "plain view," without making a physical intrusion into the vehicle, no search occurs within the meaning of the Fourth Amendment. Texas v. Brown, supra, 460 U.S. 730.[8] Where, however, as the New York Court of Appeals decided in this case, the officer intrudes into a vehicle to discover information otherwise not available by a "plain view" inspection, he conducts a "search" governed by Fourth Amendment standards. Simpson v. United States, 346 F.2d 291, 294 (10th Cir. 1965); State v. Moore, 66 Hawaii 202, 659 P.2d 70, 72 (1983); People v. Piper, 101 Ill.App.3d 296, 427 N.E.2d 1361, 1364 (1981); State v. Simpson, 95 Wash.2d 170, 622 P.2d 1199, 1210 (1980); see also State v. McGann, 124 N.H. 101, 467 A.2d 571 (1983) (reaching this result based on the state constitution).[9]

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8. Several of the lower court cases the State cites for the proposition that a VIN inspection is not a search (Br. for Pet. at 16-17) involve "plain view" examinations by a police officer from outside the vehicle, which clearly impinge on no legitimate expectations of privacy. United States v. Zemke, 457 F.2d 110 (7th Cir.), cert. denied, 406 U.S. 947 (1972); State v. Cohn, 284 So.2d 426 (Fla. Dist. Ct. App. 1973); and People v. Brooks, 405 Mich. 225, 274 N.W.2d 430 (1979).

9. In many of the lower court cases cited by the State in which a VIN inspection has been held not to constitute a "search" (Br. for Pet. at 16-17), the courts ruled that the police conduct was not a search requiring probable cause, but nevertheless considered whether the police officer had a "legitimate" or "reasonable" basis to examine the VIN. See United States v. Forrest, 620 F.2d 446 (5th Cir. 1980); United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978); United States v. Brown, 535 F.2d 424 (8th Cir. 1976); United States v. Ware, 457 F.2d 828 (7th

(footnote continued on next page)

The State concedes that respondent had a legitimate expectation of privacy in the interior of his vehicle (Br. for Pet. at 20). The State further concedes that Officer McNamee entered the car and displaced papers on the dashboard to obtain information from the interior (Id. at 25-26). Finally, the State concedes that Officer McNamee's conduct constituted an "entry and search," albeit "limited," which exposed "a few locations near the floor of the car which might have otherwise remained unseen" (Id. at 30, 33). This Court considered it to be "nothing less than sheer torture of the English language" to characterize a frisk as being anything other than a "search" governed by the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 16 (1968). Likewise, it would be inconsistent with this Court's precedents and would torture the English language to assert that Officer McNamee conducted anything other than a "search" within the

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Cir.), cert. denied, 409 U.S. 888 (1972); United States v. Zemke, supra, 457 F.2d 110; United States v. Powers, 439 F.2d 373 (4th Cir.), cert. denied, 402 U.S. 1011 (1972); United States v. Johnson, 431 F.2d 441 (5th Cir. 1970); United States v. Graham, 391 F.2d 439 (6th Cir.), cert. denied, 393 U.S. 941 (1968); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967); People v. Brewer, 112 Mich. App. 670, 317 N.W.2d 218 (1981); Wood v. State, 632 S.W.2d 734 (Tex. Crim. App. 1982); and Shirley v. Commonwealth, 218 Va. 49, 235 S.E.2d 432 (1977). Thus, these cases do not stand for the proposition that the Fourth Amendment is inapplicable to VIN inspections; in fact, they implicitly support the contrary conclusion. There are relatively few cases involving intrusive VIN inspections which employ no Fourth Amendment criteria to determine whether the police procedure was permissible: United States v. Kitowski, 729 F.2d 1418 (11th Cir. 1984); United States v. Wood, 500 F.2d 681 (5th Cir. 1974); United States v. Polk, 433 F.2d 644 (5th Cir. 1970); State v. Sedacca, 252 Md. 207, 249 A.2d 456 (1969); and People v. Valoppi, 61 Mich. App. 470, 233 N.W.2d 41 (1975). Therefore, the State is inaccurate when it asserts that the holding of the New York Court of Appeals herein "reflects a minority view which conflicts with the weight of lower court authority considering the issue of VIN inspections" (Br. for Pet. at 16).

Fourth Amendment when he opened the car door, reached inside, and disturbed papers on the dashboard, to obtain information from within the vehicle.[10]

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10. None of the State's litany of hypothetical cases in which a police officer might be allowed to intrude into a private vehicle (Br. for Pet. at 7, 24-25) involve a situation in which a police officer's incursion into the car is prompted by a desire, as here, to probe for information, which is the sine qua non of a search. Moreover, these situations all involve exigent circumstances. See Payton v. New York, 445 U.S. 573, 590 (1980).

B. Officer McNamee conducted an unreasonable search when, lacking probable cause or a reasonable suspicion that respondent's car was stolen, he searched the car for the VIN.

Under the Fourth Amendment, a search of private property without proper consent is unreasonable, except in certain carefully delineated situations, unless the officer has prior authorization in the form of a valid search warrant. Mincey v. Arizona, 437 U.S. 385, 390 (1978). Because of an automobile's mobility, the complex scheme of regulations governing motor vehicles, and the lesser expectations of privacy the public holds with regard to private cars, an officer may search an automobile without a warrant, but the requirement of probable cause remains inviolate. California v. Carney, 471 U.S. ___, 85 L.Ed.2d 406 (1985); United States v. Ross, 456 U.S. 798, 809 (1982); Carroll v. United States, 267 U.S. 132 (1925).[11] As this Court emphasized in Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973), the "automobile exception" to the warrant requirement, established in Carroll, did not "declare a field day for the police in searching automobiles. Automobile or no automobile,

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11. The few narrow, carefully drawn exceptions to the rule barring the police from searching a vehicle except upon probable cause, none of which are relevant to the instant case, include the right of the police, as a protective measure and in accordance with standard procedures, to conduct an inventory search of a vehicle impounded after the motorist is arrested [South Dakota v. Opperman, 428 U.S. 364 (1976)], and, upon making a lawful custodial arrest of a motorist, to search the person's vehicle [New York v. Belton, 453 U.S. 454 (1981)]. Contrary to the State's assertion (Br. for Pet. at 33), the "administrative search" doctrine articulated in such cases as Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972) does not authorize a police officer lacking probable cause to search an ordinary motorist. Delaware v. Prouse, 440 U.S. 648, 662 (1979); Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973).

there must be probable cause for the search."

Even where the police officer's intrusion is deemed less than a "full-blown search," the Fourth Amendment still requires that the officer comply with the prohibition against unreasonable searches and seizures. To be justified under the Fourth Amendment, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the officer's] intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). The facts, moreover, must

> be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Id. at 21-22 (citations omitted); see also United States v. Place, 462 U.S. 696, 703 (1983) (mere fact that intrusion is deemed "minimal" does not negate requirement that police have a reasonable basis for intruding on protected Fourth Amendment interest).

These principles apply with no less force when the intrusion concerns motorists and automobiles, and where the intrusion constitutes less than a full-blown search. Thus, in Delaware v. Prouse, 440 U.S. 648, 662-663 (1979), this Court held that the Fourth Amendment affords substantial protection to a motorist's expectation of privacy:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As Terry v. Ohio, supra, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Accordingly, consistent with the Fourth Amendment, a police officer may stop a motorist and detain him to check his driver's license and the registration of the automobile only where the officer has an articulable and reasonable suspicion that the motorist is unlicensed, the automobile is not registered, or either the vehicle or an occupant is otherwise subject to seizure for a violation of the law. Delaware v. Prouse, supra, 440 U.S. at 663.

In reaching this result, the Court rejected Delaware's assertion that patrol officers should be subject to no constraints in deciding which vehicles they will stop because of the State's interest in discretionary spot checks as a way to ensure highway safety and because of the limited intrusion such a procedure imposes on the public. Id. at 655. While fully acknowledging the state's "vital interest" in making sure that

motorists and vehicles comply with the highway laws and regulations, id. at 658, the Court nonetheless concluded that, on the record before it, Delaware had failed to show that "the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." Id. at 659. Given the availability of less intrusive procedures, the Court was not convinced that stopping vehicles without articulable suspicion was justified. Id.

Similarly, in Michigan v. Long, 463 U.S. 1032 (1983), the Court held that, upon lawfully stopping a motorist, a police officer may conduct a limited "protective search" of the passenger compartment of the automobile if the officer has an objectively reasonable belief, based on specific and articulable facts, that the suspect is dangerous and may gain immediate control of weapons. Id. at 1051. In reaching this decision, the Court stressed that, whenever the police conduct an investigative stop, they are not authorized, ipso facto, to conduct an automobile search, as they would be authorized to do under New York v. Belton, 453 U.S. 454 (1981), when they make a lawful custodial arrest. In an ordinary traffic stop, the police officer lacks an important justification for a search that exists in an arrest situation, i.e., the need to preserve evidence. Michigan v. Long, supra, 463 U.S. at 1049 n.14.

Emphatically, whether the police conduct is deemed to be a "full-blown search" or a lesser, constitutionally cognizable intrusion (analogous to Terry), a police officer may not intrude on a motorist's legitimate expectations of privacy where he lacks

any reasonable basis, founded on specific and articulable facts, to support his action. The officer must, at a minimum, have some "quantum of individualized, articulable suspicion" to justify his intrusion on protected privacy interests and to satisfy the "reasonableness standard" of the Fourth Amendment. Delaware v. Prouse, supra, 440 U.S. at 662; United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976). This rule must not be eviscerated if "[t]he word 'automobile' is not [to become] a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461-462 (1971) (plurality opinion).[12]

In arguing that no individualized factual basis need accompany a search of a car for the VIN, the State asks this Court to depart from its precedents requiring reasonable suspicion or probable cause whenever an officer probes a private space, exposing otherwise private information. In support of its argument that the fundamental requirement of individualized suspicion be abandoned, the State advances no justifications that have not already been fully considered in these precedents. Petitioner, for example, relies heavily on the reduced expectation of privacy within an automobile and the State's interest in "the pervasive regulatory scheme" as reasons to exempt a VIN inspection from Fourth Amendment dictates (Br. for Pet. at 21). However, these precise rationales were only

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12. The instant case arose in a law enforcement setting, the precise situation where the Fourth Amendment's requirement of individualized suspicion is most applicable. New Jersey v. T.L.O., 469 U.S. ___, 83 L.Ed.2d 720, 740 (1985) (Powell, J., concurring).

considered sufficient to justify dispensing with the warrant requirement:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of automobiles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

California v. Carney, supra, 85 L.Ed.2d at 414. Moreover, the very regulatory interests cited by the State -- promoting public safety, ensuring the qualifications of vehicles and their operators, and ensuring compliance with licensing, registration, and inspection requirements (Br. for Pet. at 21-22) -- were considered in Prouse, 440 U.S. at 658, as only sufficient to justify further reducing the probable cause requirement to reasonable suspicion. Thus, these rationales, which have already justified substantial departures from the Fourth Amendment's warrant requirement, cannot be invoked in new guise as cause to eliminate the mandate of an individualized quantum of suspicion.

Nor is generalized concern for law enforcement, arising from such a fact as the large automobile theft problem in the United States (Br. for Pet. at 23 n.*), a sufficient basis for the Court to ignore the imperatives of the Fourth Amendment. When it has been faced with other difficult law enforcement problems, such as during the Prohibition era [Carroll] or today, with the current law enforcement concern about illegal immigration [see Almeida-Sanchez v. United States, 413 U.S. 266, 276 (1973 (Powell, J., concurring)],[13] the Court has held steadfastly to the requirement that an officer may not be granted unbridled discretion in

→ [TYPESETTING NOTE: fn. 13 is on next page]

conducting a search. Therefore, none of the State's arguments justify abandoning the minimal Fourth Amendment requirement that a police officer have individualized and reasonable suspicion when he searches an automobile.

Not only is the holding of the New York Court of Appeals in the instant case therefore consistent with the prior decisions of this Court, but the court's analysis also furthers the policies of the Fourth Amendment which this Court has discussed therein.

As in Prouse, the record here does not establish that [redacted] law enforcement officers lack less intrusive methods to combat the problem of car theft which the State emphasizes. Cf. United States v. Place, 462 U.S. 696, 709 (1983); United States v. Villamonte-Marquez, 462 U.S. 579, 589 (1983); Florida v. Royer, 460 U.S. 491, 504-506 (1983) (White, J.); Delaware v. Prouse, 440 U.S. 648, 659 (1979). As the New York Court of Appeals held, the police officers could have acted under the authority of Vehicle & Traffic Law §401 (McKinney 1984-1985) and demanded to see the VIN. Alternatively, they might have run a radio check on the

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13. Roving patrols operating under the authority of the United States Border Patrol may not stop an automobile unless the officers have specific and articulable facts reasonably warranting suspicion that the vehicle contains illegal aliens. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). On the other hand, because stopping cars at fixed checkpoints, shows a high degree of effectiveness in curtailing illegal immigration, the officials lack any less intrusive methods, and the use of this procedure avoids granting undue discretion to the officer in the field, Border Patrol officers are entitled to employ this procedure even where they lack individualized suspicion as to particular vehicles. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Even at a fixed checkpoint, however, the Border Patrol may conduct a search only if the officers have probable cause. United States v. Ortiz, 422 U.S. 891 (1975).

vehicle's license plates through the computer network operated by the National Crime Information Center.[14] Since there is no demonstrably compelling justification for such a procedure, police officers should not be permitted to intrude on the physical integrity of private automobiles in order to inspect the VIN, where they lack any articulable suspicion that the vehicle in question has been stolen. If the police are permitted to intrude into the passenger compartment of private automobiles in order to conduct VIN inspections without any articulable grounds, the number of motorists whose privacy will be violated merely to detect one single stolen car will be large indeed. See Delaware v. Prouse, supra, 440 U.S. at 660. Such widespread intrusions into a motorist's legitimate expectation of privacy violate the most fundamental policies of the Fourth Amendment.

The State's argument, moreover, would eviscerate the core of the Fourth Amendment: the need to assure that an individual's reas[illegible] unfettered discretion of [illegible] officers in the field." Brown v. Texas, 443 U.S. 47, 51 (1979). Thus, in order to detect aliens, the stopping of vehicles without individual suspicion at fixed checkpoints is permitted, United States v. Martinez-Fuerte, supra, 428 U.S. at 559, but the same may not be done by roving patrols, United States v. Brignoni-Ponce, supra, 422 U.S. at 881.

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14. As is well known, radio checks of license plates frequently enable law enforcement officials to identify stolen vehicles. See, e.g., United States v. Matlock, 558 F.2d 1328 (8th Cir.), cert. denied, 434 U.S. 872 (1977); United States v. Jamerson, 549 F.2d 1263 (9th Cir. 1977); United States v. Harris, 479 F.2d 508 (5th Cir. 1973); United States v. Williams, 440 F.2d 1235 (6th Cir.), cert. denied sub.nom. Forte v. United States, 404 U.S. 837 (1971); Commonwealth v. Reid Evans, ___ Pa. Super. ___, ___ A.2d ___ (slip opinion 4/19/85); State v. Green, 680 S.W.2d 474 (Tenn. Crim. App. 1984).

Similarly, officers may not exercise unbridled discretion in choosing which vehicles they will pull over for registration or license checks. Delaware v. Prouse, supra, 440 U.S. at 655. Petitioner's claim that a police officer should be authorized to physically intrude into a private automobile to inspect the VIN, even where the officer has no articulable suspicion that the car is stolen, invites precisely the "standardless and unconstrained discretion" which this Court has vigorously condemned. Id. at 661.

The state courts found (A. 45-46, 50, 56, 59, 61), and petitioner concedes (Br. for Pet. at 32), that the police lacked probable cause or reasonable suspicion to believe that respondent's car was stolen or that it contained contraband. Indeed, Officer McNamee never voiced any reason for his intrusion. Nor did he do anything with the VIN once he found it, such as compare the number to other documents. Accordingly, regardless whether McNamee's conduct is deemed a "full-blown search" requiring probable cause, as in Carney and Ross, or a lesser intrusion cognizable under the Fourth Amendment, as in Long, Prouse, and Terry, the officer's actions in opening the door, entering the car, and disturbing papers on the dashboard, in a search for the VIN, violated respondent's right to be free from unreasonable searches and seizures.

All the circumstances point to the conclusion that Officer McNamee, lacking any rules, guidelines, standard procedures or any other neutral criteria to justify his action, acted on no more than his own "hunch" or whim when he intruded into respondent's car to inspect the VIN. Indeed, as the highest

court in New York held (A. 60), in intruding into the car without first asking respondent for the information he desired, Officer McNamee completely disregarded Vehicle & Traffic Law §401, the rule the New York Legislature enacted to govern precisely this situation. McNamee's intrusion into the car must be seen for what it was: a wholly unjustified interference with respondent's constitutional right to personal autonomy and security, free from arbitrary violation by an agent of the State.

Recognizing that Officer McNamee had no factual basis for his intrusion into the car, the State seeks to impute to him Officer Meyer's knowledge that respondent lacked a driver's license (Br. for Pet. at 31). At the time he entered respondent's vehicle, Officer McNamee had no knowledge of this fact. Nevertheless, solely because McNamee's partner learned of respondent's unlicensed status simultaneous to McNamee's incursion into the car, the State insists that McNamee should be credited with this information. The essence of Fourth Amendment analysis, however, is that a police officer's conduct must be measured against the information he possesses at the time of his action. Terry v. Ohio, supra, 392 U.S. at 21-22. Only where a police officer relies on a directive from a fellow officer or another law enforcement agency can he be credited with any information possessed by another. Whitely v. Warden, 401 U.S. 560, 568 (1971). This Court's decision in United States v. Hensley, 469 U.S. ___, 83 L.Ed.2d 604 (1985), on which the State relies, demonstrates that petitioner's argument is groundless. In Hensley, the Court held that police officers may rely on a

"wanted" bulletin issued by another police department." 83 L.Ed.2d at 614. Thus, one officer's knowledge can be imputed to another officer only where there is a transmittal of information. Mere collective knowledge, without a transmittal of information or a specific directive, is insufficient. Accordingly, since McNamee acted entirely on his own, and did not delay his intrusion into the vehicle long enough to learn what respondent told his partner, any information his partner learned but did not transmit prior to the entry into the car cannot be imputed to McNamee.[15] Any contrary rule would make a mockery of [redacted] Fourth Amendment analysis.

The State erroneously finds support in Pennsylvania v. Mimms, 434 U.S. 106 (1977), for its contention that a police officer, upon lawfully stopping a motorist for a traffic infraction, is entitled to intrude into the vehicle to inspect the VIN even if the officer lacks any reason to suspect the car is stolen (Br. for Pet. at 29). Mimms, however, is inapplicable [redacted] for several important reasons.

First, it was largely because of the "inordinate risk confronting an officer as he approaches a person seated in an automobile," Mimms, supra, 434 U.S. at 110, that the Court deemed it necessary to authorize a police officer to order a motorist

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15. The State's reliance on United States v. Ragsdale, 470 F.2d 24 (5th Cir. 1972) (Br. for Pet. at 31) is misplaced. In Ragsdale, the court based its conclusion on the fact that the officer who had the information would have had a duty to act as his partner did in searching the vehicle. See W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §3.5, pp. 631-634 (1978). In the instant case, the State has not shown that Officer Meyer, upon finding that respondent was unlicensed, had a duty to look at the VIN, or that he would have done so.

out of his vehicle. This Court rightfully does not equate the ordinary law enforcement concerns present here -- the discovery of the VIN for the purpose of enforcing a regulatory scheme or, at most, to recover stolen vehicles -- with the imperative of protecting a police officer or the public from a possibly armed suspect.[16] Notably, in the instant case, Officer McNamee asserted no particular safety rationale in support of his search for the VIN in respondent's car.[17] Finally, in Mimms the officer lacked any less intrusive means to ensure his safety. In seeking to recover stolen vehicles, by contrast, an officer has many alternative procedures available to him. In Mimms, the Court stressed that the officer merely moves the situs of an already legal detention, and such intrusion hardly rises to the level of a "petty indignity." Id. at 111. In the instant case, by contrast, the State seeks authorization for police officers to turn a routine traffic stop into a search of the interior of the

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16. Cf. New York v. Quarles, ___ U.S. ___, 81 L.Ed.2d 550, 557 (1984) (adopting an exception to the Miranda rule where necessary to protect the public against the dangers that arise when a gun is hidden in a supermarket); Michigan v. Long, 463 U.S. 1032, 1049 n.14 (1983) (distinguishing an officer's reasonable efforts to protect his own safety from a mere attempt to collect evidence); and Terry v. Ohio, supra, 392 U.S. at 27 (authorizing a police officer to frisk an individual whom he has reason to believe is armed and dangerous).

17. The State simply is wrong in asserting that the decision of the New York Court of Appeals itself gives rise to some kind of danger for police officers (Br. for Pet. at 27). The Court of Appeals' decision does not require the officer to allow the motorist back into his vehicle, but, rather, merely suggests this as one constitutional option. Another constitutional option is to secure the motorist's consent. Where, as here, the officers had no fear for their safety, they could have chosen either option.

vehicle, which plainly involves an intrusion qualitatively different and more serious than that which occurred in Mimms. Indeed, Mimms ultimately supports our position that any further intrusion in the nature of a search cannot be done in the absence of articulable suspicion. The frisk in Mimms was only justified when the officer saw a bulge, thus creating a reasonable concern for safety. Id. at 112.

The rule that a police officer may not intrude on the physical integrity of a car's passenger compartment to inspect the VIN unless he has a reasonable belief, based on specific, articulable facts, that the car is stolen, fully satisfies this Court's requirements as to the fashioning of a Fourth Amendment standard to apply to a specific factual situation: (1) the standard is workable for application by rank and file, trained police officers; (2) the standard is reasonable, because when a police officer has no articulable grounds for suspicion, there is no probability that anything warrants investigation; and (3) the standard is objective, not based on the unfettered discretion of an individual police officer. See Illinois v. Andreas, 463 U.S. 765, 772-773 (1983).

In sum, Officer McNamee conducted a "search" governed by the Fourth Amendment when he intruded into respondent's vehicle in a quest for information contained therein which was not otherwise visible and where his intrusion exposed parts of the vehicle interior with respect to which a person has a legitimate expectation of privacy. Although the warrant requirement has been discarded with respect to automobiles, probable cause is still required whenever an officer conducts a search. Even where

the intrusion amounts to less than a "full-blown search," an officer needs individualized suspicion with respect to the vehicle. The police may not exercise unfettered discretion to intrude on interests protected by the Fourth Amendment. An intrusion based on no more than a mere unarticulable "hunch" is clearly illegal. Since Officer McNamee had neither probable cause nor reasonable suspicion, his intrusion into respondent's vehicle in search for the VIN violated the Fourth Amendment.

POINT III

PETITIONER'S CLAIMS, RAISED FOR THE FIRST TIME BEFORE THIS COURT, THAT (1) A MOTORIST LACKS A REASONABLE EXPECTATION OF PRIVACY IN A VEHICLE WHEN HE HAS NO LICENSE, AND (2) THE POLICE ARE ENTITLED TO SEARCH A MOTORIST'S VEHICLE WHENEVER THEY ARE AUTHORIZED TO PLACE THE PERSON UNDER ARREST FOR A TRAFFIC INFRACTION, ARE NOT PROPERLY OR ADEQUATELY PRESENTED FOR THIS COURT'S REVIEW AND, IN ANY EVENT, ARE MERITLESS.

As the State concedes (Br. for Pet. at 34 n.*), prior to the time this Court granted certiorari, petitioner had never raised in the state courts its present assertions that (1) a motorist lacks a reasonable expectation of privacy in a vehicle when and simply because he is unlicensed, and (2) the police were entitled to search respondent's vehicle simply because they could have arrested him for a traffic infraction. These legal claims were not presented to, passed on by, or developed in, the New York courts, and thus are not properly presented at this time. In any event, even if this Court reaches these contentions, it should reject them as lacking merit.

A. Petitioner may not raise in this Court legal issues that were not presented to, passed on by, or factually developed in, the state courts.

A long-standing rule of this Court bars review of questions urged by a petitioner or appellant that were not presented to or passed on by the lower courts. Because of "due regard for the appropriate relationship of this Court to state courts," this rule applies with particular force with respect to cases that come before this Court from a state court. McGoldrick v. Compagnie Generale, 309 U.S. 430, 434 (1940). The rule against

considering a question not pressed or passed on below has been described as being jurisdictional in nature. See Webb v. Webb, 451 U.S. 493, 496-497 (1981); Hill v. California, 401 U.S. 797, 805-806 (1971); State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154, 160 (1945).

This Court has consistently applied the "not pressed or passed on" rule to bar the State from raising legal grounds to rebut a defendant's Fourth Amendment claim where those grounds had not been presented to, passed on by, or developed in, the lower courts. For instance, in Steagald v. United States, 451 U.S. 204, 209 (1981), the Court refused to entertain a "standing" claim proffered by the government which had not been developed in the lower courts. In Illinois v. Gates, 462 U.S. 213, 223 (1983), the Court held that it could not consider whether there is a "good faith" exception to the exclusionary rule where petitioner, the State of Illinois, had failed to raise this argument in the state courts, and the state courts had not passed on the question. Likewise, in Hayes v. Florida, 470 U.S. ___, 84 L.Ed.2d 705, 709 n.1 (1985), the Court held that it could not reach the State's argument, never raised in the state courts, that the inevitable discovery exception to the exclusionary rule was applicable to the Fourth Amendment issue presented. As in Steagald, Gates and Hayes, the Court should not address the new issues the State raises in this Court.

This Court has articulated three reasons why, in a case such as this, review of legal contentions first raised in this Court is improper: (1) general federalism concerns require that the state courts be given the first chance to consider the

constitutionality of the actions of state officials; (2) requiring the State first to raise its claim in the state courts enables those courts to rest their decisions on adequate and independent grounds in state law; and (3) when a legal argument was not raised below, the record is likely to be inadequate because the facts were not developed with a view toward resolving such an issue. Illinois v. Gates, supra, 462 U.S. at 221-222; Cardinale v. Louisiana, 394 U.S. 437, 439 (1969). These three considerations apply with special force in this case.

Federalism concerns weigh heavily against considering petitioner's legal contentions that were not previously presented to the state courts. Surely, the New York courts are no less concerned than this Court about enforcement of the laws on New York highways. Indeed, since licensing statutes are clearly within the realm of state regulatory interests, the state courts should have the first opportunity to address the consequences of noncompliance with their own state regulations. Likewise, policies as to whether a particular traffic infraction merits a full arrest and search are particular concerns of the state courts and legislatures. Ordinary concerns for the proper relationship between state and federal courts require that novel claims, such as those petitioner seeks to raise, first be asserted in the state courts.

Similarly, the need to allow the state courts the opportunity first to consider adequate and independent state grounds counsels against this Court's consideration of these claims for the first time. As we show in Point I, ante, the New

York Court of Appeals, since People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783 (1967), has consistently held that New York law bars the police from conducting a search, upon stopping a motorist for a routine traffic infraction, unless there are independent grounds to justify such an intrusion. A New York statute [Vehicle & Traffic Law §401] governs how officers may obtain the VIN and other documentation from a stopped motorist (A. 60). The New York Court of Appeals has previously held that, under the New York Constitution, the "search incident to arrest" doctrine is more restrictive on police officers than its analogue under the Fourth Amendment, as construed in New York v. Belton, 453 U.S. 454 (1981). Under New York law, a police officer needs a specific factual basis to justify the search of an arrestee, and there must be a temporal and spatial nexus between the arrest and the search. People v. Gokey, 60 N.Y.2d 309, 312, 457 N.E.2d 723 (1983); People v. Smith, 59 N.Y.2d 454, 458, 452 N.E.2d 1224 (1983). Had petitioner raised its "no expectation of privacy" and "search incident to arrest" claims below, the New York Court of Appeals might well have rejected them based on state law. Surely, where state law already substantially controls a question, this Court should be most reluctant to reach out and decide an issue never previously presented to the state courts.[18]

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18. The State concedes that, since Marsh, the New York Court of Appeals has construed New York law as it relates to the issues raised in this Court but which petitioner never asserted in the state courts (Br. for Pet. at 44 n.*). Since New York law already bars an officer from routinely conducting a search upon making an arrest, petitioner misreads New York law in suggesting that the New York Court of Appeals has left "unresolved" the

(footnote continued on next page)

Moreover, under the procedural rules of the New York Court of Appeals, petitioner would have been barred from presenting its present claims to the New York Court of Appeals, as it had failed to raise them in the lower state courts. See People v. Johnson, 64 N.Y.2d 617, 619 n.2, 474 N.E.2d 241 (1984) (State cannot urge on appeal theory of brief, limited inquiry, where its claim in the lower court was that investigative seizure was justified based on reasonable suspicion); People v. Dodt, 61 N.Y.2d 408, 416, 462 N.E.2d 1159 (1984) (where State argued in trial court that police had probable cause to arrest defendant, State cannot then urge on appeal that no arrest took place because defendant voluntarily accompanied the police to the station). Thus, had the State raised its new claims when the case was before the New York Court of Appeals, an adequate and independent procedural bar in New York law would have barred that court from reaching these propositions. [redacted] Webb v. Webb, supra, 451 U.S. at 498 n.4; Wainwright v. Sykes, 433 U.S. 72, 86-87 (197

Because petitioner never raised its new legal contentions in any of the three state courts which addressed the propriety of the search involved, the factual record was not developed in such a manner as to permit evaluation of petitioner's claims. As to the State's claim concerning respondent's status as an unlicensed motorist, the record is clearly inadequate. The record

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question whether an officer may conduct a search incident to a mere traffic stop (Br. for Pet. at 44 n*). If New York law prohibits an officer from conducting a search routinely upon a full custodial arrest, it is illogical to suppose that an officer would be authorized to take such action upon a mere traffic stop. The only apparent reason why petitioner would fail to raise, in the state courts, a legal issue on which those same courts have already spoken extensively is that petitioner expected the state courts to hold in favor of respondent based on New York law.

establishes only that respondent had no driver's license the day he was stopped by Officers Meyer and McNamee. In fact, the judge that presided at respondent's suppression hearing barred the prosecutor from inquiring whether respondent ever had a license (A. 36), because it was not relevant to any legal issue asserted by the State in the courts below. It is pure speculation to suggest that respondent never had a license and, therefore, was an unsafe driver who had to be taken off the road (Br. for Pet. at 35). It may have been that respondent's license simply expired the day before the police officers stopped him, that he had a license renewal application pending, or that his license was lost, misplaced, or stolen. Since these factual possibilities could affect, if not defeat, petitioner's legal claim and policy arguments concerning the "unlicensed" motorist, petitioner's claim cannot properly be addressed.

The factual record is equally inadequate to permit evaluation of the State's claim that the police should have been permitted to search respondent's vehicle simply because they could have arrested him for speeding. As the State's claim is based, in part, on the assertion that the officers' failure to arrest respondent for his traffic infractions was "merely fortuitous" and that they only "hesitated" to effect a full custodial arrest in this case, the factual record is insufficiently developed. There was, simply, no evidence that respondent would have been arrested, quickly or otherwise, simply because the officers observed him driving 5 to 10 miles per hour above the speed limit. Nor was there any testimony that

respondent would have been placed under arrest simply because he was driving a car with a cracked windshield and did not have a driver's license. There is no evidence that this was New York Police Department policy or practice, or the routine practice of the officers who stopped respondent. Indeed, to the extent the record was developed as to this issue, it clearly does not help the State's argument. Respondent was merely given a summons for two infractions. The most likely scenario is that, had Officer McNamee not entered the car and found a gun, the officers would have permitted respondent to proceed on his way. See People v. Marsh, 20 N.Y.2d 98, 102, 228 N.E.2d 783, 786 (1967) ("[T]he statutory scheme does not contemplate treating [the motorist] as a common criminal to be booked, photographed, fingerprinted and jailed.").

The claims the State now desires to raise in this Court are especially inappropriate for consideration without discussion below because they require determinations regarding state licensing requirements and state practices concerning arrests for routine traffic infractions. It would be particularly inappropriate for this Court to consider these arguments without an opportunity for the state courts first to consider definitive questions of underlying state law that, in view of the extensive development of New York law as to these general matters, may

render academic any federal question.[19]

---

19. The cases petitioner cites in support of its assertion that its claims are properly presented for this Court's review (Br. for Pet. at 34 n.*) are inapposite. In both Illinois v. Gates, 462 U.S. 213 (1983), and Steagald v. United States, 451 U.S. 204 (1981), the Court held it could not reach the Fourth Amendment arguments the state sought to raise, as they had not been asserted or factually developed below, precisely the situation here. In Wilson v. Cook, 327 U.S. 474 (1946), the Court held it could not reach an issue that was neither presented to nor decided by the state court. Even though the question sought to be raised in this Court was related in some way to the one presented to the state court, and even though it arose under the same implied federal immunity from state taxation, the argument was not properly before the Court because it was distinct from the question decided by the state court. Id. at 483. The same rule requires the Court to refrain from deciding the two new issues the State seeks to raise in the instant case. Although both issues arise under the Fourth Amendment, they are clearly distinct from the narrow questions presented to, and decided by, the New York Court of Appeals. In Raley v. Ohio, 360 U.S. 423 (1959), the argument in the lower courts was a due process claim arising from a state agency's failure to instruct a witness to answer or else be held in contempt. When the case came before this Court, the petitioners contended that they relied on positive assurances that their Fifth Amendment privilege was available. The Court permitted this claim to be raised because it was "only a variation" of the former theme, which was put into sharper focus by the Ohio Supreme Court's theory of decision. Id. at 437 n.12. Here, by contrast, petitioner advances entirely new theories, never advanced before. Moreover, this case does not involve a sharpening of focus of arguments considered by the state courts because the State never gave those courts the opportunity to pass on the contentions sought to be raised here. Since the record in the instant case is inadequate to permit resolution of the new issues the State wishes to raise, these issues are not properly before the Court. Dewey v. Des Moines, 173 U.S. 193, 198 (1899). Under this Court's precedents, thus, it is plainly not enough that the issue before this Court involves the same general constitutional provision (i.e., the Fourth Amendment) that was addressed in state court. Cf. Stanley v. Illinois, 405 U.S. 645, 658 n.10 (1972). The concurring opinion in Fuller v. Oregon, 417 U.S. 40, 58 (1974) (Douglas, J., concurring), on which the State relies, relates to a case in which one Justice, in dissent, is criticized for raising an issue "substantially different" from one that had previously been developed in the state courts. Finally, Scott v. United States, 436 U.S. 128 (1978), simply is not a case where a party raised an issue in this Court that had not been raised below.

A final reason this Court should refrain from reaching the additional claims the State now raises is that they were not presented in its petition for a writ of certiorari. See Supreme Court Rules 21.1(a) and 34.1(a). For all the foregoing reasons, this Court should decline to address the arguments raised in Points I.C. and I.D. of petitioner's brief.

B. On the merits, the State's assertion that an unlicensed motorist lacks a reasonable expectation of privacy in a vehicle he lawfully possesses is incorrect.

Although petitioner styles its claim in terms that avoid the word "standing,"[20] the State's contention reduces itself to the assertion that a motorist has no standing to assert the violation of his Fourth Amendment rights simply because he lacks a driver's license. This assertion should be soundly rejected as lacking any basis in logic or precedent.

The State's contention that an unlicensed motorist lacks standing to assert a violation of his Fourth Amendment rights arising from a search of his car is fundamentally flawed. Under the precedents of this Court, a determination as to standing looks to whether the litigant is in lawful possession of the object which is searched, and whether he asserts his own right to

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20. Petitioner's reluctance to cast its argument in "standing" terms may arise from this Court's holding, in Steagald v. United States, 451 U.S. 204, 209 (1981), that the government may not raise a "standing" argument in this Court for the first time. As in Steagald, although the grounds for the State's "expectation of privacy" claim existed at the time of the suppression hearing, this contention was never asserted until the case came before this Court.

be free from unreasonable searches and seizures. Rakas v. Illinois, 439 U.S. 128, 139 (1978). Notably, the State concedes that respondent was in lawful possession of the car when he was stopped by the police (Br. for Pet. at 37). Therefore, under established law, respondent crossed the basic threshold of "standing" to assert a violation of his Fourth Amendment rights arising from Officer McNamee's search of the vehicle. Yet, the State urges that, although a person has lawful possession of the chattel in question, his ability to assert his Fourth Amendment rights can be defeated solely by virtue of the way in which such chattel is used. The State cites not a single case which supports this novel proposition.

Indeed, the single hypothetical cited by the State illustrates the absence of any justification for the doctrine petitioner proposes. If a car thief lacks standing to assert a Fourth Amendment violation arising from a search of the stolen car (Br. for Pet. at 36), that is because his possession, of the vehicle, ab initio, is unlawful. Thus, as a threshold matter, since such a person had no lawful possession of the chattel, he has no right to litigate any invasion of privacy with respect to it. By contrast, a motorist, irrespective of his licensed status, has an established possessory interest, and thus has legitimate expectations of privacy, in the vehicle.

Nor is there any logic to the State's assertion that respondent lost his expectations of privacy by turning on the ignition and driving down the highway (Br. for Pet. at 37-38). The State's contention rests on two assumptions: first, that when respondent commenced driving the vehicle, he had to expect that

he would commit an act which would give rise to a lawful stop of his car by the police; and second, that, upon being stopped, respondent "had" to have known that the police would search his vehicle (Br. for Pet. at 35-36). Based on these assumptions, the State retrospectively concludes that respondent had no expectation of privacy when he first commenced operation of the vehicle. Not only is this argument unacceptably attenuated, but it also rests on pure speculation. There is no evidence that respondent had reason to believe that he would be stopped. Moreover, the fact that he closed the door of his car when he got out to talk with the police officers, indicates that respondent had a a clear expectation of privacy with respect to the vehicle's interior. Finally, the State cannot reasonably assert that respondent "had" to have known that his vehicle would eventually be searched. In fact, on this record, there is every reason to believe that the officers here would merely have issued respondent a summons and would have allowed him to proceed, had Officer McNamee not entered the car and found a weapon. See People v. Howell, 49 N.Y.2d 778, 779, 403 N.E.2d 182 (1980) (arrest is neither called for nor preferred procedure when motorist is stopped for reckless driving, a misdemeanor). The State cites no evidence in support of its assertion (Br. for Pet. at 35) that the police would, in fact, have placed respondent

under arrest for his traffic infractions alone.[21] Nor does the State advance any support, statistical or otherwise, for its contention that the vehicle would have been searched.

Mere unlawful use of chattel cannot defeat a person's previously attached, threshold entitlement to assert a violation of his Fourth Amendment rights to such chattel. Such unlawful use is relevant only to the subsequent determination of the ultimate Fourth Amendment claim. Thus, for instance, unlawful operation of a vehicle might lead to consequences under a state's regulatory statutes or penal laws, or, if a police officer knows of such a violation, the officer's knowledge may be considered in assessing the reasonableness of the officer's intrusion. The same rule applies in other settings. A person in lawful possession of premises, even if those premises are used illegally, has the right to insist that the police abide by the requirements of the Fourth Amendment when they intrude upon his possessory and privacy interests therein. While the illegal use of premises, if known by the police, may itself serve as a

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21. Notably absent from this record is any support for the State's contention (Br. for Pet. at 35, 37) that any "presumption" of danger arises with regard to unlicensed motorists, which would presumably lend support to petitioner's assertion that the police officers necessarily would have taken respondent into custody on this ground alone. In New York, driving without a license is classified as a violation, for which a fine from $100 to $200 may be levied. New York Vehicle & Traffic Law §509 (McKinney Supp. 1984-1985). There is no basis to assert, as does the State, that a driver who simply lacks a license can be compared to a person who attempts to drive while intoxicated (Br. for Pet. at 35 n.*). The extreme hazard posed by intoxicated motorists is such that one cannot conceive of a conscientious police officer permitting such a driver to proceed on his way. See Welsh v. Wisconsin, 466 U.S. ___, 80 L.Ed.2d 732, 746-747 (1984) (Blackmun, concurring).

justification for a police intrusion on such premises, the mere fact of such illegal use is not sufficient to deprive the person of his threshold right to challenge the reasonableness of the intrusion under the Fourth Amendment. What the State suggests in the instant case is that a person, solely because of his illegal use of given property, would not even be able to complain of a Fourth Amendment violation, even where the police defy legal processes and do so without any knowledge of the illegal use.

The logical extension of a "standing" doctrine that turns on a person's illegal use of property he lawfully possesses illustrates the bankruptcy of the doctrine itself. For example, a person who is in lawful possession of premises, whose lawful possession thereof gives him an expectation of privacy therein, an invasion of which he has a right to litigate under the existing precedents of this Court, would lose standing solely on the ground that such premises are used illegally, such as for gambling [McDonald v. United States, 335 U.S. 451 (1948)] or narcotics [Johnson v. United States, 333 U.S. 10 (1948)], or in violation of some local zoning, licensing, labor or health regulation. Ultimately, the State's contention is that a person who has an established possessory or privacy interest in property loses standing to challenge an invasion of such interests merely on the assumption that he must expect that his unlawful use of his property might come to light. This contention suggests that anyone who violates the law lacks standing to object to any violation of his rights under the Fourth Amendment.

The simple fact that a motorist lacks the same degree of privacy in his automobile that a person has within his own home,

cf. South Dakota v. Opperman, 428 U.S. 364, 367 (1976), in no way supports the State's assertion that a motorist lawfully in possession of an automobile, who merely lacks a driver's license, forfeits all expectation of privacy, as might someone who has already been tried, sentenced and imprisoned for a criminal offense, such as a prisoner [Hudson v. Palmer, 468 U.S. ___, 82 L.Ed.2d 393 (1984)] or an escaped convict [United States v. Roy, 734 F.2d 108 (2d Cir. 1984)] (Br. for Pet. at 36-37). The State's contention is entirely lacking in merit.

In sum, the State has no support in logic or precedent for its claim that unlawful use of property defeats established possessory and privacy rights therein. Once a possessory interest and expectation of privacy is established, the threshold criterion of standing is met. Unlawful use of chattel is then relevant to the substantive Fourth Amendment analysis, but does not operate to deprive the lawful possessor of his already vested entitlement to challenge invasions of his possessory interests in such chattel. A contrary result would create a wholesale exception to this Court's standing doctrine for anyone whose use of chattel is in technical violation of the law. Such cannot possibly be the case if the constitution is to have any continuing vitality in a world where regulatory statutes cover nearly every aspect of modern life.

C. On the merits, the "search incident to arrest" doctrine does not apply where the police, although authorized to arrest a motorist for a traffic infraction, do not take such action.

The State's assertion that a police officer is entitled to conduct a search of an automobile whenever he is authorized to make an arrest, but does not take such action, is fundamentally flawed because it seeks to have this Court create a "search incident to possible arrest" doctrine. Such a doctrine finds no support in the history or sound policies of the Fourth Amendment. Rather, the State seeks to turn the narrow "search incident to arrest" doctrine on its head and apply it to a situation where none of the justifications for the doctrine exist.

In United States v. Robinson, 414 U.S. 218, 235 (1973), this Court explained the rationale behind the "search incident to arrest" doctrine as follows:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Similarly, in New York v. Belton, 453 U.S. 454, 457 (1981), the Court wrote that the "search incident to arrest" doctrine adopted in Chimel v. California, 395 U.S. 752 (1969), provides "that a lawful custodial arrest creates a situation which justifies the contemporaneous search" of the arrestee.

One rationale for the "search incident to arrest" doctrine

is the fact that, once a person is placed under arrest, that person retains little further expectation of privacy. United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977). This rationale is inapplicable to a case where, as here, the person is not placed under arrest. Other reasons for the doctrine are the need to "disarm the suspect in order to take him into custody," United States v. Robinson, supra, 441 U.S. at 234, and to prevent the suspect from escaping, Abel v. United States, 362 U.S. 217, 236 (1960). These reasons are equally inapplicable to the instant case, for there is no suggestion or evidence that Officers Meyer and McNamee were ever in danger, or that they had any intention to arrest respondent for his traffic infractions. A final justification for the "search incident to arrest" doctrine is the need to preserve evidence, which, as this Court recently held, is inapplicable in an ordinary investigative stop such as occurred in the instant case. Michigan v. Long, 463 U.S. 1032, 1049 n.14 (1983).

Moreover, to the extent the State relies on "the risks inherent in a traffic stop" as a basis for authorizing a "protective search of the vehicle" incident to a traffic stop (Br. for Pet. at 42), petitioner ignores the significance of Michigan v. Long, 463 U.S. 1032 (1983). There, the Court authorized such a protective search only where there was a factual basis for the officer to fear for his safety. (Here, of course, there is no such evidence). Thus, by implication, the mere fact of the traffic stop is insufficient to justify an intrusion into the vehicle.

Because of the narrow and limited nature of the "search incident to arrest" doctrine, for this rule to apply there must first be a lawful custodial arrest: "a search incident to a lawful arrest may not precede the arrest and serve as part of its justification." Sibron v. New York, 392 U.S. 40, 67 (1968); see also People v. Evans, 43 N.Y.2d 160, 164-166, 371 N.E.2d 528, 531-532 (1977); People v. Erwin, 42 N.Y.2d 1064, 369 N.E.2d 1170 (1977).

It bears repetition (see Point I, ante) that, in New York, an arrest for an ordinary traffic violation such as respondent committed in this case is anything but a foregone conclusion. In People v. Howell, 49 N.Y.2d 778, 779, 403 N.E.2d 182 (1980), the New York Court of Appeals wrote that the trial court

> was in error in its conclusion that merely because reckless driving is a misdemeanor rather than a traffic violation, the arrest was inevitable. An arrest in a situation such as was presented in this case was neither called for nor the preferred procedure.

If an arrest would not necessarily ensue in a case where the motorist has committed the misdemeanor of reckless driving, surely petitioner overstates its case in asserting that it was "merely fortuitous" (Br. for Pet. at 38) that the officers did not arrest respondent for having committed the traffic infractions of driving a car without a license and operating a vehicle with a cracked windshield, neither of which is even classified as a misdemeanor in New York. New York Vehicle & Traffic Law §§155, 375(22), 509(1) (McKinney Supp. 1984-1985). Neither inevitable nor "preferred" in New York, an arrest in the instant case was highly unlikely, as the officers did not even

issue respondent a summons for a speeding violation [New York Vehicle & Traffic Law §1180 (McKinney Supp. 1984-1985)] or claim that they would have arrested him for either of the two remaining violations.

Since the police did not arrest respondent for his traffic infractions, and there is no reason, either based on established practice or on this record, to assume they would have done so, the "search incident to arrest" doctrine is inapplicable. Applying the doctrine to cases in which the police are authorized to arrest a citizen for a petty offense, but they neither take nor intend to take such action, would grant the police power to conduct searches in a limitless array of situations, thus substantially negating the public's right to be free from unreasonable searches and seizures. Adoption of the doctrine proposed by the State would thus lead to the illogical result of the police having power to search property belonging to citizens stopped for any number of petty offenses that the police themselves deem unworthy of an arrest.

The "search incident to arrest" doctrine is a limited, narrowly defined, exception to the general rule that prohibits a search in the absence of a warrant issued upon probable cause. Mincey v. Arizona, 437 U.S. 385, 390 (1978). There is no cause to expand the doctrine to a situation where, as here, none of its justifications exist.

CONCLUSION

For the reasons stated in Point I, the writ should be dismissed. In the alternative, for the reasons stated in Points II and III, the judgment should be affirmed.

Respectfully submitted,

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No. 84-1181

IN THE

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October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF FOR THE PETITIONER

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Other Authorities:

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FBI, Press Release of August 18, 1985 5
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REPLY BRIEF FOR THE PETITIONER

POINT ONE

The issues raised by petitioner are properly before this Court.

In his brief, respondent asserts that the issues raised by petitioner are not properly before this Court because the decision of the New York Court of Appeals rested upon an "adequate and independent state ground" (Resp. Br. 9-15) and because the factual record is insufficient to support petitioner's arguments before this Court (Resp. Br. 34-41). Both of these contentions are meritless. Under this Court's

decision in *Michigan* v. *Long*, 463 U.S.1032, 77 L.Ed.2d 1201 (1983), the opinion of the New York Court of Appeals, which repeatedly refers to the Fourth Amendment and decisions of this Court construing that amendment and makes only a single, fleeting reference to the state constitution, could not be based on an "adequate and independent state ground" and, furthermore, the record below is more than sufficient to support petitioner's arguments.

A. This Court Has Jurisdiction To Review Petitioner's Claim

In a quixotic attempt to have the writ of certiorari dismissed, respondent challenges this Court's jurisdiction by claiming that the decision of the New York Court of Appeals is "expressly predicated" on the state constitution (Resp. Br. 9) and, thus, rests upon an "adequate and independent state ground." In order to make such a challenge however, respondent is required not only to ignore the opinion written by the state court, but also to misconstrue this Court's holding in *Michigan* v. *Long*, 77 L.E.2d 1201, as applied to that opinion.

In *Michigan* v. *Long*, *supra*, the state court relied on federal cases, but held the search in question violative of both the federal and state constitutions. *Id.* at 1212. Notwithstanding the specific reliance of the state court on its own constitution, this Court found no "adequate and independent state ground" and adopted a "consistent approach" [*id.* at 1213] to guide its determination of future cases. Under that approach, where a state court decision appears either to rest on federal law or be "interwoven" with federal law, the Court will "assume," absent a "plain statement" to the contrary, that the state court decided the case on federal grounds. *Id.* at 1214. Notwithstanding the clear application of *Long* to the opinion below, which repeatedly cites the Fourth Amendment and cases from this Court construing that amendment, and which does not

contain a contrary "plain statement" that the opinion rests on truly independent state grounds, respondent nevertheless feebly argues that ". . . because the adequacy and independence of the state ground is clear from the face of the state court's opinion . . . *Long* does not apply" (Resp. Br. 9). His claim is completely meritless, as even the most cursory examination of the opinion itself reveals that the presence of an adequate and independent state ground is anything but "clear" and, in fact, an alternate state ground that could serve to divest this Court of jurisdiction to hear the instant case is wholly absent from the text of the lower court opinion.

Indeed, the sole reference to the state constitution appears in the opening paragraph where the court holds the search violative of *both* the federal and state constitutions (A. 55).* This perfunctory reference to the state constitution is mere surplusage to the court's examination of the federal constitution, and is wholly insufficient to defeat this Court's jurisdiction. *See California* v. *Carney*, —— U.S. ——, 85 L.Ed.2d 406, 412 n.1 (1985); *Michigan* v. *Long*, 77 L.Ed.2d at 1212; *South Dakota* v. *Neville*, 459 U.S. 553, 74 L.Ed.2d 748, 754 n.5 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 651-652 (1979) (jurisdiction upheld where state courts relied on both federal and state constitutions). This is especially true because following that singular reference, the New York Court of Appeals, relying on this Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977) and *Katz* v. *United States*, 389 U.S. 347 (1967), states "[t]he Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy' " (A. 57), and then, relying on *Texas* v. *Brown*, 460 U.S. 730 (1983), continues that ". . . simply peering inside an automobile does not constitute a search and the Fourth Amendment consequently does not limit this activity" (A. 57) before relying on this Court's decision in *United States* v. *Place*, 462 U.S. 696 (1983), for

* Numerals preceded by "A." refer to pages of the Joint Appendix.

its conclusion that a search occurred in the instant case* because the officer exposed "hidden areas" (A. 57). What is "clear," in the end, is that the New York Court of Appeals' reliance on the Fourth Amendment and cases from this Court construing that amendment, establishes the substantial federal basis for the decision. *See Ohio* v. *Johnson*, —— U.S. ——, 81 L.Ed.2d 425 (1984); *Texas* v. *Brown*, 75 L.Ed.2d at 507 n.1 (1983); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-567 (1977) (jurisdiction upheld where state courts relied on Supreme Court precedent).

Moreover, even the New York Court of Appeals' decisions relied upon by that court in its opinion below, were based on federal law. The decisions in *People* v. *Harrison*, 57 N.Y.2d 470, 457 N.Y.S.2d 199, 443 N.E.2d 447 (1982) (A. 59), *People* v. *Miller*, 43 N.Y.2d 789, 402 N.Y.S.2d 392, 373 N.E.2d 286 (1977), *aff'g*, 52 A.D.2d 425, 385 N.Y.S.2d 457 (1st Dept. 1976) (A. 57) and *People* v. *Sullivan*, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (1971) (A. 57) all relied exclusively on the Fourth Amendment, while the cases of *People* v. *David L.*, 56 N.Y.2d 698, 451 N.Y.S.2d 733, 436 N.E.2d 1324, *cert. denied*, 459 U.S. 866 (1982), *rev'g on dissenting op.*, 81 A.D.2d 893, 439 N.Y.S.2d 152 (2d Dept.) (A. 59) and *People* v. *Perel*, 34 N.Y.2d 462, 358 N.Y.S.2d 383, 315 N.E.2d 452 (1974) (A. 57) cited to both the federal and state constitutions, but relied almost exclusively on this Court's decisions. *See Oliver* v. *United States*, —— U.S. ——, 80 L.Ed.2d 214, 222 n.5 (1984); *California* v. *Beheler*, 463 U.S. 1121, 77 L.Ed.2d 1275, 1278 n.1 (1983); *Oregon* v. *Kennedy*, 456 U.S. 667, 671 (1982) (jurisdiction upheld where state court relied on state cases interpreting federal law). In fact, of the numerous cases cited in the court's opinion, only *People* v. *Cruz*, 34 N.Y.2d 362, 357 N.Y.S.2d 709, 314 N.E.2d 39 (1974) (A. 57) and *People* v. *Marsh*, 20

* Petitioner challenged this conclusion in our opening brief (Pet. Br. 16-27).

N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967) (A. 59) were decided on the basis of state law and those cases are not relied on as square support for the proposition that the type of police action involved here was unlawful.

Although respondent now claims that *People* v. *Marsh*, 20 N.Y.2d 98 serves as the "foundation" for the court's decision (Resp. Br. 10), it is interesting to note that *Marsh* is not discussed, but merely cited once in the opinion (A. 59) and, even at that, is preceded by the signal "*cf.*" which indicates that it ". . . supports a proposition *different* from the main proposition but sufficiently analogous to lend support." *A Uniform System of Citation ("The Bluebook")* at p. 9 (13th ed. 1981) (emphasis added). Clearly then, *Marsh* could not serve at the "foundation" for the court's decision.

Indeed, respondent's extended discourse on *Marsh* and the present state of New York search and seizure law (Resp. Br. 10-13)* is quite unnecessary in light of this Court's statement in *Michigan* v. *Long*, 77 L.Ed.2d at 1214 that it did ". . . not wish to continue to decide issues of state law that go beyond the opinion that we review . . . ." Since the New York Court of Appeals' opinion discusses neither *Marsh*, nor the development of New York law in this area,

* As we argued in our opening brief, *People* v. *Marsh*, 20 N.Y.2d at 101, decided in 1967, prohibited searches of the *person* incident to arrests for routine traffic violations on the ground that traffic violations pose no danger to police officers; a premise which has been tragically disproven in the eighteen years since that case was decided (Pet. Br. 44n). Although our opening brief provided statistics concerning police officers killed during the routine traffic violation which *Marsh* found so harmless (Pet. Br. 41n), since the filing of our opening brief, new statistics for the first six months of 1985 have been compiled which reveal a startling increase in the number of police officers killed during routine traffic stops. Of the 44 police officers killed during the first six months of 1985, 10 or 23% were killed during routine traffic stops [*source:* FBI, Press Release of August 18, 1985] as contrasted with 1984 when, of the 72 officers killed in the line of duty, 8 or 11% were killed during routine traffic stops. *Source:* FBI, Press Release of May 12, 1985.

but chooses instead to rely upon the Fourth Amendment, respondent's detailed discussion of *Marsh* (Resp. Br. 10-13) is not only unnecessary, but largely irrelevant.

What is relevant, however, is that the New York Court of Appeals has a "long tradition" (Resp. Br. 13) of expanding the rights of criminal defendants under the state constitution. Significantly though, in prior instances in which the New York Court of Appeals has construed its own constitution more broadly than the federal constitution, it has done so clearly and unequivocally, announcing specifically that its ultimate decision was based on the New York constitution alone. *See, e.g., People* v. *Gokey,* 60 N.Y.2d 309, 469 N.Y.S.2d 618, 457 N.E.2d 723 (1983) (although the Fourth Amendment would have permitted the search of a duffle bag as incident to the arrest, the search was unlawful under the New York constitution); *People* v. *Adams,* 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379 (1981) (although the Supreme Court under the federal constitution would admit evidence of a suggestive, though reliable identification, such evidence is not admissible under the New York constitution); *People* v. *Elwell,* 50 N.Y.2d 231, 241, 428 N.Y.S.2d 655, 406 N.E.2d 471 (1980) (although the Supreme Court under the federal constitution would have found that the informant provided the police with probable cause to effect a warrantless arrest of the defendant, the New York constitution required that the officers personally observe additional indicia of criminality); *People* v. *Cunningham,* 49 N.Y.2d 203, 207, 424 N.Y.S.2d 421, 400 N.E.2d 360 (1980) (although the Supreme Court had not construed the federal constitution so broadly, as a matter of state constitutional law, once a suspect in custody requests the assistance of counsel, he may not thereafter, despite a desire to do so, be questioned further without the presence of counsel); *see also, People* v. *McIntyre,* 36 N.Y.2d 10, 15, 364 N.Y.S.2d 837, 324 N.E.2d 322 (1974) (although the Supreme Court had not yet recognized the federal constitutional right of a

criminal defendant to proceed *pro se*, the New York constitution clearly recognized such a right).

That the New York Court of Appeals, with this "long tradition" of unequivocally pronouncing its reliance on the New York constitution to expand defendants' rights, refuses to make such a pronouncement in its opinion below, is no mere coincidence. On the contrary, the court's reticence in this regard, when coupled with its repeated citation to the Fourth Amendment and this Court's decisions construing that amendment, makes crystal clear its intention to base the decision below on the federal constitution.

Indeed, the clarity of the court's intention to base its decision on federal grounds is not blurred by the discussion, toward the conclusion of the opinion, of New York Vehicle & Traffic Law § 401(4) (McKinney 1984). Although respondent maintains that the New York Court of Appeals' parting reference to this statute establishes an adequate and independent state ground (Resp. Br. 12-13), an examination of the statute itself, omitted from respondent's brief, proves that it could not conceivably constitute such an adequate and independent state ground.

New York Vehicle & Traffic Law § 401(4) (McKinney 1984) provides, in pertinent part:

> Carrying certificate of registration. Every person operating a motor vehicle or a motor vehicle and a trailer, registered or transferred in accordance with any of the provisions of this chapter, shall upon demand of any magistrate, motor vehicle inspector, peace officer, acting pursuant to his special duties, or police officer produce for inspection the certificate of registration or the registration renewal stub for such vehicle and shall furnish to such magistrate, inspector, peace officer or police officer any information necessary for the identification of such vehicle and its owner, and all information required concerning his license to operate,

> if he is required by law to have such a license, and shall, if required, sign his name in the presence of such magistrate, inspector, peace officer or police officer as a further means of identification (A. 59).

Plainly, this statutory provision, which is administrative in nature, expressly assures a police officer's right to demand a motorist's license and registration, and does not address the right of a police officer to search or inspect that motorist's vehicle. For this reason, the New York Court of Appeals refuses to authorize the instant VIN inspection under this largely inapposite statute. However, respondent has seriously erred by equating this refusal to find authority in that statute for a VIN inspection, with an argument that the statute constitutes an independent state ground prohibiting the VIN inspection. Neither by its language, nor by the lower court's opinion, can this statute be construed as affirmatively prohibiting the type of police conduct which occurred here. Rather, according to the New York Court of Appeals, only the Fourth Amendment constitutes such a prohibition and had that amendment not prohibited the search, no state statute would have prevented the officers from undertaking the VIN inspection. Therefore, this Court has jurisdiction to review petitioner's claim.

B. The Record Below Supports Petitioner's Arguments

Throughout the litigation of this case in the New York courts, petitioner has consistently asserted that the search of respondent's vehicle was reasonable under the Fourth Amendment. In our opening brief, we proffered two alternative theories concerning the reasonableness of the search which had not been pursued in the state courts (Pet. Br. 34-49). Respondent now claims that these new analytical approaches cannot be considered by this Court, but his claim is meritless because the new approaches, which are based on the identical issue raised in both the state courts and our petition for certiorari, are fully supported by the record.

At the outset, it should be noted that respondent is correct in his assertion that "[a] long-standing rule of this Court bars review of *questions* urged by a petitioner or appellant that were not presented to or passed on by the lower courts" (Resp. Br. 34) (emphasis added). He has seriously erred however, in claiming that petitioner has somehow changed the question from that raised in the New York courts. That *question* is, was, and remains whether the search of respondent's vehicle was reasonable under the Fourth Amendment and only the *analysis* of that question has changed. Petitioner presents this Court with two new analytical approches to the unchanged question of reasonableness under the Fourth Amendment: one provides that respondent's status as an unlicensed driver deprived him of any legitimate and reasonable expectation of privacy with regard to the vehicle's passenger compartment, rendering its search reasonable under the Fourth Amendment (Pet. Br. 34-38); and the other provides that the search of the passenger compartment was reasonable and, thus, lawful under this Court's holding in *New York* v. *Belton*, 453 U.S. 454 (1981) as incident to respondent's seizure for a traffic violation (Pet. Br. 38-49).

Apparently, respondent has seemed to confuse the rule of this Court prohibiting the raising of new questions or claims, with the equally well established rule allowing parties to raise new or alternative theories in support of the claims or questions previously raised in state court. *See Illinois* v. *Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 554 (1983) (White, J., concurring) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below."); *Scott* v. *United States*, 436 U.S. 128, 138 (1978) (search may be sustained under a different theory than that used initially to justify it); *Fuller* v. *Oregon*, 417 U.S. 40, 58 (1974) (The Court may adopt alternative theories from those raised in state courts

provided the federal question is not rendered "substantially different."); *Stanley* v. *Illinois,* 405 U.S. 645, 658 n.10 (1972) (The Court's method of analysis may differ from that utilized by the lower court); *Raley* v. *Ohio,* 360 U.S. 423, 437 n.12 (1959) (arguments may vary from those raised below); *Dewey* v. *Des Moines,* 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."); *see also* R. Stern and E. Gressman, *Supreme Court Practice* 230 (5th ed. 1978) (a litigant "may advance different theories or arguments in support of the questions raised in the state courts."); *cf. Wilson* v. *Cook,* 327 U.S. 474, 483 (1946) (argument raised before the Court was no mere "enlargement" of the one raised in state court but was "so distinct" that the Court would not consider it). Taken to its logical extreme, respondent's argument equating the raising of new questions with the use of new or alternative arguments, would require all litigants before this Court to file briefs essentially identical to those filed in state court lest they fear rejection of their claims for even the slightest deviation in their analyses. Obviously, this Court has never endorsed such a practice and alternative theories in support of claims raised in lower courts have always been included in briefs and reviewed by this Court. Accordingly, this Court may review petitioner's new analytical approaches to the identical question raised in the state courts, our petition for certiorari and our opening brief, i.e., whether the search of respondent's vehicle was reasonable under the Fourth Amendment.

Indeed, this Court may review these new arguments notwithstanding its decision in *Illinois* v. *Gates,* 76 L.Ed.2d 572 and *Steagald* v. *United States,* 451 U.S. 204 (1981), upon which respondent relies so heavily (Resp. Br. 35-36). Those cases raised for the first time on writ of certiorari, respectively, claims of a "good faith" exception to the

exclusionary rule and defendant's lack of "standing"* to contest the search; threshold issues regarding the remedy or right to seek a remedy under the Fourth Amendment as distinguished from the reasonableness of the searches themselves under that amendment. Thus, in marked contrast to the instant case, those cases clearly concerned "substantially different" [*Fuller* v. *Oregon*, 417 U.S. at 58] claims and not just new theories. In fact, *Gates* and *Steagald* involved claims that were so radically different from those raised in the lower courts, that the records in the cases were woefully inadequate to support either the "good faith" of the police officers or the privacy interests necessary for defendant to have "standing." *See Illinois* v. *Gates*, 76 L.Ed.2d at 537; *Steagald* v. *United States*, 451 U.S. at 210; *see also Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

Here, however, petitioner's new theories concerning the reasonableness of the search have more than ample support in the record. The record contains the following testimony concerning respondent's status as an unlicensed driver:

> Q. Mr. Class, the day you were stopped by police did you have a license on you?
>
> A. No.
>
> The Court: You have to speak up.
>
> A. No, sir.
>
> Q. On that day, were you a licensed operator?
>
> A. No.

(A. 36). Obviously then, not only was respondent missing his driver's license when the police stopped him, but he

* Although respondent characterizes our argument concerning his status as an unlicensed driver (Pet. Br. 34-38) as a "standing" argument (Resp. Br. 41-46), in fact, it is not, and relates solely to respondent's expectation of privacy as it bears on the reasonableness of the intrusion or search involved, which we agree he had the right to contest.

was not even a licensed driver at that time.* The record could not conceivably have been more clear on this issue.

Equally clear from the record was respondent's commission of various traffic violations (A. 12, 13, 19, 21). Although respondent laments the absence of ". . . evidence that respondent *would have* been arrested . . ." (Resp. Br. 39) (emphasis added) for these traffic violations, such evidence plays no role in the formulation of our argument. In our opening brief we argue only that based on his traffic violations, New York Law [N.Y. Crim. Proc. Law § 140.10(2) (McKinney 1984); N.Y. Veh. & Traf. Law § 155 (McKinney 1984)] provides that respondent *could have* been arrested, and it is this power to arrest from which the right to search evolves (Pet. Br. 38-49). What the officers would have done is quite irrelevant insofar as our argument, after the establishment of the traffic violations themselves, is legal and not factual in nature. Thus, the evidence in the record concerning the traffic violations is more than sufficient to support our purely legal argument that respondent could have been arrested for the traffic violations and, hence, his car could have been searched. Therefore, petitioner's claims are fully supported by the record and are properly before this Court.

POINT TWO

The routine inspection of respondent's VIN plate following the lawful stop of his vehicle for a traffic violation was reasonable and, thus, lawful.

In our opening brief we advance several alternative theories in support of the instant VIN inspection, including the argument that probable cause existed to arrest respondent, not for car theft, but for a traffic violation, and that

* The record also establishes that respondent was issued a summons for being an unlicensed operator (A. 19).

this fact justified a VIN inspection (Pet. Br. 32). Though our arguments are diverse, they are bound together by a single theme: the reasonableness of the police conduct. Nevertheless, foresaking any attempt to analyze the police conduct for its reasonableness, respondent argues in his brief that since the VIN inspection was unsupported by either "probable cause" or "reasonable suspicion" to believe the vehicle was stolen, it was *per se* violative of the Fourth Amendment (Resp. Br. 22-34). This analytical approach is fundamentally flawed, however, because it ignores the ultimate question of reasonableness under the Fourth Amendment; a question not amenable to easy resolution through reflexive reliance on neat, familiar concepts such as "probable cause" or "reasonable suspicion."

In the first instance, it is axiomatic that the "ultimate" inquiry upon review of a particular search under the Fourth Amendment is whether or not that search was "reasonable." *See United States* v. *Villamonte-Marquez,* 462 U.S. 579, 77 L.Ed.2d 22, 30 (1983); *Michigan* v. *Summers,* 452 U.S. 692, 699-700 (1981); *Payton* v. *New York,* 445 U.S. 573, 620 (1980) (White, J., dissenting); *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 315-316 (1978); *Pennsylvania* v. *Mimms,* 434 U.S. 106, 108-109 (1977); *Terry* v. *Ohio,* 392 U.S. 1, 19 (1968); *Camara* v. *Municipal Court,* 387 U.S. 523, 539 (1967). Although the concepts of "probable cause" and "reasonable suspicion" are often useful in determining the reasonableness of a given search, they are not, as respondent claims, "inviolate" (Resp. Br. 22) and this Court has upheld searches lacking in either "probable cause" or "reasonable suspicion" concluding that they nevertheless passed muster under the "ultimate" test of reasonableness. *See New Jersey* v. *T.L.O.,* —— U.S. ——, 83 L.Ed.2d 720, 734 (1985) (refusing to apply the probable cause standard to searches of students by school officials and adopting a general reasonableness standard to govern such searches); *United States* v. *Villamonte-Marquez,* 77 L.Ed.2d at 30-31 (refusing to apply an "articulable suspicion" standard to

random searches of vessels at sea and upholding such searches under the "overarching principle of reasonableness"); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (upholding police officers' right to order motorists out of their vehicles following traffic violations as reasonable, notwithstanding the absence of anything "unusual or suspicious" about their behavior); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-562 (1976) (upholding border patrol stops of vehicles at fixed checkpoints as reasonable notwithstanding the absence of "individualized suspicion"); *see also Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring) (eschewing a "hard-and-fast standard of probable cause" in favor of a reasonableness determination); *cf., Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (probable cause requirement bears on reasonableness determination but is not required under all circumstances). Respondent, however, in his zeal to fit the instant VIN inspection within one of these two useful categories, has completely lost sight of the inherent reasonableness of the police conduct at issue. *See Florida* v. *Royer*, 460 U.S. 491, 519 (1983) (Rehnquist, J., dissenting) (eschewing ". . . a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on . . ." and applying a reasonableness standard to the search at issue). Had respondent analyzed the VIN inspection for its overall reasonableness instead of concentrating exclusively on the presence or absence of either "probable cause" or "reasonable suspicion" to believe the vehicle was stolen, he too would conclude that the minimally intrusive VIN inspection passed muster under the "ultimate" test.

Indeed, following the concededly valid stop of the vehicle for numerous traffic violations,* the officer did nothing more

* These traffic violations serve to distinguish the instant case from *Delaware* v. *Prouse*, 440 U.S. 648 (1979) where this Court struck

(footnote continued on next page)

than open the door of the vehicle and move some papers on the dashboard which obstructed his view of the VIN plate. He did not conduct a rummaging search of the passenger compartment, nor did he ransack it in a determined effort to ferret-out contraband. Rather, he merely displaced several offending scraps of paper and insofar as this simple action was necessitated by respondent's own conduct in obscuring the VIN plate, which would have otherwise been readily viewable to the officer from outside the vehicle, it ill behooves respondent to now protest such a "*de minimis* intrusion." *Pennsylvania* v. *Mimms*, 434 U.S. at 111.

Moreover, since a VIN plate inspection would normally involve the simple act of peering through the windshield at the dashboard, it would have posed no intrusion whatever had it not been for respondent's conduct and thus, it is ironic that he proposes several methods "less intrusive" than a VIN inspection to combat car theft (Resp. Br. 28-29). In any event, not only are "less intrusive" methods such as computer checks less effective because they fail to consider that the vehicle may not have been reported stolen, but, as this Court has so recently recognized ". . . *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, —— U.S. ——, 105 S. Ct. 1568, 1576 (1985); *see Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973) ("The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable.") Thus, respondent's hindsight reliance on plausible, though less effective

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down the practice of randomly stopping vehicles for license inspections because it vested "unbridled discretion" [*id.* at 661] in police officers. Obviously, since the instant stop was precipitated by respondent's numerous traffic violations, it was not the result of "unbridled" police discretion.

alternatives* can undermine neither the reasonableness of the minimally intrusive conduct undertaken, nor the significance of his own actions in obscuring the VIN plate. Viewed in this context, the almost trivial actions of the officer in opening the door and brushing aside some papers on the dashboard, during which he inadvertently observed and seized a loaded weapon [*see Texas* v. *Brown*, 460 U.S. 730 (1983); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) (plurality], though they created an undeserved furor in the New York Court of Appeals, amounted to little more than "much ado about nothing" (Pet. Br. 30). Clearly then, the instant VIN inspection was reasonable and, thus, lawful under the Fourth Amendment.

Conclusion

For the foregoing reasons and those stated in our opening brief, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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* In addition to the license check, another of respondent's "plausible" alternatives was for the officers to have demanded that respondent uncover the VIN plate himself (Resp. Br. 28) which, as we argued in our opening brief (Pet. Br. 26-27), would have had the unsettling result in the instant case of sending respondent back into a vehicle where he had, in fact, concealed a loaded weapon.

(3)

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No. 84-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW YORK,

Petitioner,

v.

BENIGNO CLASS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., THE NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

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BENIGNO CLASS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., THE NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

This is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Mario Merola, Bronx District Attorney, Bronx, New York, Counsel for Petitioner, and William E. Hellerstein, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-nine times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *Illinois Association of Chiefs of Police, Inc.*, and *New York State Association of Chiefs of Police, Inc.*, are not-for-profit associations consisting of members who are police chiefs and senior law enforcement executives. They too, seek to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety, including through the all-important process of investigating reports of stolen vehicles. In addition, the New York State Association is particularly concerned about the restrictive effect of the decision below in the State of New York,

and the Illinois Association's concern about the problem of stolen vehicles in that state is well expressed by Illinois Secretary of State Jim Edgar whose article is cited in this brief.

The *Legal Foundation of America (LFA)* is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici well know the problems faced by police officers in their good faith attempts to investigate stolen vehicles in a manner that comports with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate complex of rules as applicable to automobiles, and specifically the identification of stolen vehicles, as well as the scope of the auto theft problem, compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

The Court Below Erroneously Construed the Fourth Amendment by Holding That a Police Officer Conducted a Search When, After Lawfully Stopping the Respondent's Automobile for a Traffic Infraction, He Pushed Aside Some Papers on the Dashboard In Order To Routinely Inspect the Car's Vehicle Identification Number, Which is Ordinarily Viewable Through the Windshield

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police,* various state associations of chiefs of police, and the *Legal Foundation of America.* Those briefs have presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement impact of the issues raised by the parties.

We must, however, note the legal unsoundness of the New York Court of Appeals' conclusion that when the police officer opened the door of respondent's automobile and reached inside in order to view the vehicle identification number (hereinafter referred to as VIN), he conducted a search within the purview of the Fourth Amendment.

As noted in footnote 2 of the dissenting opinion, *People v. Class,* 63 N.Y.2d 491, 483 N.Y.S.2d 181, 186 (1984), the issue has been considered by a large number of courts prior to it being addressed by this Court. The decisions break down roughly into three groups: (1) those holding that entry into a motor vehicle to observe the VIN is not a search under the

Fourth Amendment; (2) those holding that even if such a procedure is a search, it is a limited procedure that can be executed on less than probable cause (reasonable suspicion such as that triggered by an observed traffic violation); and (3) those invalidating police inspections of VIN's on the basis that probable cause was lacking.

The cases are exhaustively collected in footnote 2 and *amici* will not burden this Court with repetition. It appears, however, that the third view is a minority.

Amici submit that the better reasoned view is found in the opinions of those courts adopting the first position, although we also submit that should this Court adopt the position that reasonable suspicion is required in such cases, that standard has been more than amply satisfied in this case where the Respondent had committed a traffic infraction (speeding) and failed to produce a driver's license.

Among the many decisions holding to the first view, the court in *United States v. Polk*, 433 F.2d 644 (5th Cir. 1970) perhaps best summarized the legal and policy issues involved in police inspection of VIN's:

> . . . such a limited inspection of a vehicle identification number is not a search within the meaning of the Fourth Amendment. The rationale for this holding is that an automobile owner can have no reasonable expectation of privacy with respect to the car's VIN. . . .
>
> Vehicle identification numbers are put on automobiles by the manufacturers to aid in identifying the vehicles. There are so many similar cars that individual vehicles can be identified only through the use of such individual numbering. State laws contain many requirements for disclosing and recording such VIN's, showing a generally accepted mode of disclosure and the lack of any reasonable expectation of privacy with respect to the numbers.
>
> Most states require that automobiles be registered with a state agency to establish a record of car ownership. The registration, which must be carried in the car, identi-

fies the car by its VIN. These requirements proceed from a purpose to keep track of the ownership of potential instruments of personal and property injury, so that drivers in automobile accidents can be traced and so that compulsory insurance requirements can be enforced.

. . .

It is routine practice for policemen stopping cars in traffic control operations to ask for the automobile registration papers in addition to the driver's license. Viewing registration papers is part of the accepted regulatory scheme.

VIN's are typically disclosed to private parties also. Automobile purchase and sale documents usually identify the car by its VIN. Automobile insurance policies also identify cars by their VIN's. There can therefore be no reasonable expectation of privacy with respect to the identity of the VIN. Opening the car door, looking under the hood, or crawling under the car to inspect the rear axle does not independently bring an inspection of the VIN within the scope of the Fourth Amendment.

A car is not a home. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the "plain view" of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from searching eyes. . . .

Thus the VIN on the rear axle or on the car frame are outside any reasonable expectations of privacy. Those that may be seen only by opening the car door or hood are no more private: doors and hoods are continually opened to the eyes of observers. Although opening the door of a car may involve a technical trespass, such action does not invade any expectations of privacy.

433 F.2d at 647.

Amici well know from our experience as law enforcement and public interest associations that the problem of auto theft has assumed monumental proportions in our country. We also

know that the VIN has taken its place as crucial to any even remotely successful law enforcement effort to cope with the auto theft problem.

As recently described by Illinois Secretary of State Jim Edgar:

> Auto theft is second only to illegal drug sales in providing monetary gain for the criminal element in our society. Approximately 1 million vehicles were stolen nationally in each of the last three years . As a result, auto theft is costing U.S. vehicle owners an estimated $4 billion a year in higher insurance rates.
>
> In Illinois, about 54,000 vehicles were stolen in 1984. An estimated 40,000 were dismantled at chop shops so that specific parts could be sold to unscrupulous body shops and repairers.

Edgar, *Combating Organized Auto Theft,* Illinois Police Association Journal, April 1985, p. 8.

Edgar described some of the activities of the State of Illinois in attempting to cope with this problem and the role played by the VIN in law enforcement attempts to identify and track stolen vehicles, especially with respect to the operations of interstate chop shops:

> The Springfield Auto Theft Unit operates in central Illinois. During 1984, the unit conducted a seven-month investigation resulting in the arrest of a Charleston man and the recovery of at least 19 stolen automobiles with an estimated value of over $250,000. Larry McGrath, owner of McGrath's Auto Repair, allegedly disguised vehicles stolen from the Chicago area by replacing their vehicle identification number (VIN) plates with VIN plates from salvaged vehicles. Investigators recovered VIN plates and interiors from stolen vehicles, as well as the stolen vehicles themselves.
>
> The East St. Louis Auto Theft Unit handles cases in southern Illinois. A four-month investigation of a chop shop being operated on a farm near Collinsville concluded with the arrest of six men last year on 32 counts of auto theft and conspiracy.

> The group was responsible for at least 15 thefts of Ford trucks from parking lots and private residences in Madison and St. Clair Counties, and in Missouri. The trucks were taken to the farm, owned by Joseph Waitukaitis, where they were cut into pieces and the parts sold. The group was also switching VIN plates from salvage trucks to stolen trucks.

Edgar at 8.

Interestingly, Edgar also notes that the problem has another facet: "In addition to being an important law enforcement issue, auto theft is an important consumer issue. Unsuspecting buyers may unwittingly purchase potentially dangerous cars and parts."

Edgar at 8.

The scope of the problem is further seen in statistics gathered by the New York State Police. According to the 1984 New York Statewide Police Information Network, Year End Report, p. 1305, 140,347 vehicles were reported stolen in New York State in 1984, and there were 29,062 cases of stolen license plates. With such widespread traffic in stolen license plates, and therefore the unreliability of license plates as indicia of ownership, the role of the VIN in identifying vehicles takes on even greater proportions.

Even though a VIN can be seen through the windshield (unless obscured by extraneous materials), there is frequently a duplicate VIN on the door frame and often thieves will put a stolen VIN or a VIN obtained from salvage vehicles on the dashboard that does not match the door frame VIN. Thus there is the additional necessity of the police checking more than the dashboard VIN to accurately determine the nature of the vehicle. VIN switching by chop shop operators is common, as noted by Edgar.

It was recently reported by Dudley Clendinen in the New York Times that:

> Massachusetts had the highest rate of car theft in the country in 1983, the most recent year for which figures are available from the Federal Bureau of Investigation. Michigan and New York came next. Losses due to car theft, the [Massachusetts] Governor's office said, total $65 million in Massachusetts every year, and $5 billion in the nation as a whole.

Clendinen, *Device Could Aid Police in Tracking Stolen Cars,* New York Times, April 13, 1985, p. 6.

Clendinen described an electronic tracking device that can be implanted within a vehicle and activated by the police upon report of the vehicle's theft. Such a device could indeed introduce a more sophisticated technology to the law enforcement task of locating and recovering stolen vehicles, but it should not be supposed that its use will become general in the foreseeable future due to, among other factors, its cost (approximately $500 for car owners, $2,300 for police tracking units, and $500,000 to $1 million dollars for statewide engineering and systems hardware: Clendinen, p. 6).

Amici submit that unfettered law enforcement access to the VIN, wherever located on a vehicle, is essential. We say this on the basis of our experience and the collective experience of our membership, including chiefs of police from every part of the United States and every type of police agency. We will be pleased to witness the space age technology of beeper tracking of stolen vehicles, but until that day arrives access to the VIN will remain the only effective link in identifying and recovering stolen vehicles. We respectfully submit that if this Court rules that there is a protected privacy interest in the VIN and its location, requiring application of a probable cause standard, effective law enforcement efforts in this area will virtually cease.

CONCLUSION

Amici respectfully submit that the decision of the New York Court of Appeals should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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(10)

No. 84-1181

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

BEST AVAILABLE COPY

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

RESPONSE TO THE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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No. 84-1181

IN THE

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THE PEOPLE OF THE STATE OF NEW YORK,
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BENIGNO CLASS,
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RESPONSE TO THE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

ARGUMENT

The motion for permission to file a supplemental brief should be denied; alternatively, respondent's contention that the writ of certiorari should be dismissed on jurisdictional grounds is without substance.

The Court should deny respondent's motion for permission to file a supplemental brief, or in the event that such permission is granted, the Court should deny respondent the ultimate relief which he seeks—a dismissal of the writ of certiorari on jurisdictional grounds.

In *Michigan* v. *Long*, 463 U.S. 1032 (1983), the Court announced that in order to avoid the unseemly and highly speculative assessment of state court decisions for the purpose of ascertaining federal jurisdiction when the state court has cited both federal and state constitutional provisions in granting relief, the Court would henceforth limit its jurisdictional considerations to the "face" of the opinion under review:

> Accordingly, when as in this case, a state court decision fairly appears to rest *primarily* on federal law, or to be *interwoven* with the federal law, and when the adequacy and independence of any possible state law ground *is not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the case as it did because it believed the federal law required it do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement in its judgment or opinion* that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

463 U.S. at 1040-41 (emphasis added).

By the present motion and supplemental brief, respondent would have the Court now depart from this rule of *Michigan* v. *Long*, *supra*, go far beyond the four corners of the opinion in *People* v. *Class*, 63 N.Y.2d 491 (1984) (A. 55-65),* and find instead that the Court's jurisdiction to hear the instant case has been rendered void *ab initio* by a footnote in a later, generally unrelated decision of the state court, *People* v. *Melvin Johnson*, —— N.Y.2d —— (decided November 26, 1985), issued a full year after the *Class*

* Numerical references preceded by "A." are to the pages of the Joint Appendix.

decision being reviewed by this Court, during which year the composition of that seven-judge Court of Appeals was altered by the departure and replacement of two of the judges who had participated in the *Class* decision. If this Court's plain statement in *Michigan* v. *Long*, which was designed to eliminate the speculative debate about the interpretation of state court opinions, is to have any meaningful effect, respondent's efforts to have this Court engage now in a post-argument analysis of New York State law, based upon the New York Court of Appeals' new, retrospective, fleeting comment in a largely unrelated decision, should be summarily rejected. For, such an endeavor is fundamentally antithetical to the spirit and purpose of the salutary rule of *Michigan* v. *Long*. Accordingly, the Court should not condone an extension of the debate already had, at length, about the analytical foundations of *People* v. *Class* beyond the face of that decision. Therefore, the Court should refuse respondent permission to file a supplemental brief, the sole purpose of which is to extend this discussion to a consideration of the meaning of a citation in a footnote in an unrelated state case.

In any event, the New York Court of Appeals' footnote in *People* v. *Melvin Johnson* does not bear out respondent's contention that it has now, surprisingly and suddenly, become clear that the New York Court of Appeals' year-old decision in *New York* v. *Class* rested on truly independent state grounds. There has never been any dispute before this Court that the New York Court of Appeals asserted that the police action in *Class* violated both the federal and the state constitutions. *People* v. *Class*, 63 N.Y.2d 491, 493 (1984) (A. 55); *see* United States Const., Amend. IV; New

York Const., Art. I, § 12. As this Court is well aware from the original briefs filed by the parties (Resp. Br., Pt. I; Pet. Reply Br. 2-8) and from oral argument, it has been petitioner's contention throughout that from the face of the *Class* opinion (A. 55-65) it is evident that the decision rested largely on federal constitutional grounds, and that, at the very least, the state constitutional concerns were "interwoven" with those of the federal constitution; "[t]his is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did'." *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979) *cited with approval in Michigan* v. *Long*, 463 U.S. at 1042, n.8.

The majority's footnote in *People* v. *Johnson* does not, on its face, defeat this conclusion. In *Johnson*, where the New York Court of Appeals uttered a "plain statement" that it was deciding that case solely on state constitutional grounds, a five-judge majority of the Court of Appeals suppressed a defendant's confession because he had been arrested in violation of the state constitutional rule pertaining to the manner in which the police are required to assess the reliability of informants. The footnote to which respondent now draws the Court's attention answers an argument posited by the two concurring judge's that New York's state exculsionary rule was founded on common law evidentiary concerns, rather than upon the state constitution. By the footnote in issue, the New York Court of Appeals asserted that the state constitution did give rise to an exclusionary rule, and merely cited *People* v. *Class* as an example. However, nothing in that footnote plainly says that reliance on the state constitution and its

exclusionary rule in *Class* was not "interwoven" with a reliance on the federal constitutional provisions and the federal exclusionary rule. Nor is there anything in the footnote which plainly declares that the state constitution, alone, would have required suppression of the evidence in *Class*, had the Court of Appeals not "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Michigan* v. *Long*, 463 U.S. at 1042, n.8. Rather, to accept respondent's arguments for a divestiture of jurisdiction, this Court would first have to interpret the meaning of this ambiguous footnote in precisely the same fashion that it had eschewed in *Michigan* v. *Long*.

In the end, it should not be for a state Court of Appeals, perhaps displeased by the grant of certiorari in a case it decided primarily on federal constitutional grounds, to have the ultimate power to deprive this Court of its jurisdiction, after the fact, by a new, skewed interpretation of an earlier decision which so plainly rested on, and was interwoven with, federal constitutional concerns. This Court, from the date on which it grants certiorari until the date on which it renders final opinion, should not have to remain ever-vigilant for subsequent state-law interpretations which construe an earlier case to mean something quite other than that which was plainly stated on the face of, and within the four corners of, that decision.

Conclusion

The motion for permission to file a supplemental brief should be denied; alternatively, respondent's contention that the writ of certiorari should be dismissed on jurisdictional grounds should be rejected.

Respectfully submitted,

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Supreme Court, U.S.
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No. 84-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

v.

BENIGNO CLASS,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

---

MOTION OF RESPONDENT FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF

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MOTION OF RESPONDENT FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ARGUMENT

The undersigned, a Member of the Bar of this Court, and the Attorney of Record in the above-referenced case, as successor to William E. Hellerstein, hereby moves, pursuant to this Court's Rule 35, that Respondent be granted leave to file a supplemental brief. The grounds for this motion are as follows:

1. A major issue in the instant case is whether the judgment of the New York Court of Appeals was based on adequate and independent state grounds, and is therefore unreviewable by this Court. See Brief for Respondent at 9-15, Reply Brief for Petitioner at 2-8.

2. Subsequent to the oral argument of this case, the New York Court of Appeals, on November 26, 1985, decided *People* v. *Melvin Johnson*, ___ N.Y.2d ___, ___ N.E.2d ___, ___ N.Y.S.2d ___, N.Y.L.J., December 3, 1985, at 17, col. 3.

3. The relevance of *People* v. *Johnson* to the instant case springs from footnote 3, in which the Court of Appeals cited *People* v. *Class*, the judgment under review in this Court, as a case in which the New York Court of Appeals "has excluded evidence on state constitutional grounds in the past." ___ N.Y.2d at ___, ___ N.E.2d at ___, ___ N.Y.S.2d at ___, N.Y.L.J., December 3, 1985, at 18 col. 1.

In order to notify this Court of the decision in *People* v. *Johnson*, and furnish a copy of the opinion of the Court of Appeals, counsel hereby moves for leave to file a supplemental brief.

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SUPPLEMENTAL BRIEF FOR RESPONDENT

As we argued in our main brief, see Brief for Respondent at 9-15, and at oral argument, Respondent maintains that the judgment of the New York Court of Appeals in the instant case was based on adequate and independent state grounds, and is therefore unreviewable by this Court.

We file this Supplemental Brief only to note that Petitioner's argument that the Court of Appeals did not rest its decision on state law, Reply Brief for Petitioner at 2-8, is negated by the November 26, 1985, decision of the New York Court of Appeals in *People* v. *Melvin Johnson*, ___ N.Y.2d ___, ___ N.E.2d ___, ___ N.Y.S.2d, ___, N.Y.L.J., December 3, 1985, at 17, col. 3. *People* v. *Johnson* addresses the question whether New York law retains the two pronged test for determinations as to probable cause despite this Court's decision in *Illinois* v. *Gates*, 462 U.S. 213 (1983).

The relevance of *People* v. *Johnson* to the instant case springs from footnote 3 of the opinion, in which the Court of Appeals cited *People* v. *Class*, the judgment under review in this Court, as a case in which the New York Court of Appeals "has excluded evidence on state constitutional grounds in the past." ___ N.Y.2d at ___, ___ N.E.2d at ___, ___ N.Y.S.2d at ___, N.Y.L.J., December 3, 1985 at 18 col. 1.

The explicit language of the Court of Appeals in *People* v. *Johnson* confirms that the court's decision in the instant case was based on state law, and is therefore unreviewable by this Court. For the Court's convenience, a copy of the slip opinion in *People* v. *Johnson* is attached hereto as an appendix.

CONCLUSION

IN VIEW OF *PEOPLE* v. *JOHNSON*, AS WELL AS FOR THE REASONS STATED IN POINT I OF THE BRIEF FOR RESPONDENT, AND THE POINTS WE MADE AT ORAL ARGUMENT, THE WRIT SHOULD BE DISMISSED.

Respectfully submitted,

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APPENDIX

APPENDIX

State of New York
Court of Appeals

No. 574

THE PEOPLE &C.,

Respondent,

v.

MELVIN JOHNSON,

Appellant,

OPINION

This Opinion Is Uncorrected And Subject To Revision Before Publication In The New York Reports.

(574) Faith O'Neil & William E. Hellerstein, NY Legal Aid, For *Appellant*.

Mario Merola, DA, Bronx County (Anastasios Sarikas Of Counsel) For *Respondent*.

SIMONS, J.

Defendant has been convicted by a jury of felony murder and related crimes arising from the slaying of a storeowner during a robbery. The evidence against defendant included two inculpating post-arrest statements he made which he contends were improperly received in evidence because he was arrested without probable cause and the statements were products of that unlawful arrest. The arrest was unlawful, defendant contends, because the police acted solely upon hearsay information given them by a suspect named Bolivar Abreu whose information did not satisfy the reliability requirement of the *Aguilar-Spinelli* rule (*see, Aguilar* v. *Texas*, 378 US 108; *Spinelli* v. *United States*, 393 US 410). The People assert the information was reliable because it contained admissions by Abreau against

his penal interest, it was corroborated by independent investigation by the police and, failing these, because the hearsay supplied probable cause under the "totality of the circumstances" standards of *Illinois* v. *Gates* (462 US 213; *see, also, Massachusetts* v. *Upton*, ___ US ___, 80 L Ed 2d 721). We find no basis for reliability under the *Aguilar-Spinelli* rules and we decline to apply *Illinois* v. *Gates* to warrantless arrests. Inasmuch as there was no attenuation of the unlawful police conduct, the judgment must be reversed and defendant's statements suppressed.

On March 3, 1982, Raymundo Alcantara was shot and killed during the attempted robbery of his grocery store in the Bronx. Shortly thereafter, Joseph Di Prospro told officers questioning him on an unrelated charge that Bolivar Abreu was the shooter in the Alcantara homicide. This information was passed along to Detective Ernest Wieting who questioned Abreu. At first Abreu denied any knowledge of the Alcantara homicide but he subsequently implicated Di Prospro and defendant by describing a conversation he witnessed between them during which they discussed the crime. Abreu also stated that he and others traded a rifle for a .38 caliber revolver (presumably the revolver used in the crime) two months earlier and he identified other robberies committed by defendant and Di Prospro.[1] After obtaining this statement, Detective Wieting

[1] The statement in full was as follows:

"On Wednesday March 3, 1982, about 2 p.m. I was in my girls' apartment 1492 Watson 6J. Also in the apartment was Smokey (Melvin Johnson) and Joseph Di Prospro. *He (Joseph) asked me if I wanted to go in with him and Smokey in a robbery. At first I agreed but at 4:30 to 5 p.m. they left the apartment and locked me in the apartment.* Myself and Gina stayed in the apartment.

We stayed there and between 6 p.m. and 6:30 both Joseph and Smokey came in. At first Joseph came in smiling he went into the kitchen he had a black 38 cal. larger than a police service revolver. The gun had a bridge it had a brown plastic handle Beige colored tape on it—it was made in Germany on the side it had the initials 'BU'

arrested defendant and Di Prospro. At the time of the arrest, defendant had not been identified through a photo array or a line-up, and no other individuals had implicated him. The arrest was based solely on Abreu's statement.

After defendant was read his *Miranda* rights, he agreed to talk to the police, at first giving them various exculpating versions of his activities, but eventually confessing to the crime. He stated that during the robbery Di Prospro had pulled out a gun, that a struggle resulted when the proprietor grabbed for it and that during the struggle Di Prospro fired the gun at the proprietor. He repeated the confession in a later videotape statement.

Defendant moved to suppress his statements but the Suppression Court found probable cause for defendant's arrest and

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scratched into it. *About 2 months ago we traded a dude a rifle for the gun.* He emptied the shells on the floor all the six were spent.

He said numerous times that he had killed this nigger. I asked him what happened, Smokey then said, they went into a store and Joey had the gun he cocked it back and said this is a stick-up. The man had his hands in his pants pockets. Joey told him to take his hands out of his pockets. Then the man took his hands out of his pockets and grabbed the gun. The man went back and came back at him and Joey fired again and again four times in a row. Joey saw him reaching for something and Joey told Smokey to run. Smokey ran out and the man chased them out of the store. Joey fired once more and then the man started shooting and Joey fired once more. Smokey said he ran to Boynton to Watson and then to Whalen and Watson. Joey started saying that ain't the first person I shot. It was bothering him he repeated the story like Smokey said. Joey said he ran to Ward to Watson to Whalen. He came straight up to the house. *Joey said to me late that night that the cops picked him up but let him go because they didn't have anything on him.* He told me this when he came to my house he said he threw the gun down the sewer.

They also hit the bakery on Westchester. A grocery store on Evergreen and Westchester, the Spanish Restaurant. The bakery on 1 and Croes. Smokey threw the empty shells out the kitchen window." (Emphasis added.)

denied his motion. The Appellate Division affirmed without opinion. The legal issue before us is the minimum factual showing necessary to support a finding of probable cause (*see*, *People* v. *Bigelow*, ____ NY2d ____, dec. herewith; *People* v. *McRay*, 51 NY2d 594, 601; *cf. People* v. *Wharton*, 46 NY2d 924, 925; *cert denied* 444 US 800).

A police officer may arrest a person without a warrant when he has probable cause to believe that such person has committed a crime.[2] Probable cause may be supplied, in whole or part, through hearsay information (*see*, *People* v. *Landy*, 59 NY2d 369, 375; *People* v. *Rodriguez*, 52 NY2d 483, 488-489; *People* v. *Hanlon*, 36 NY2d 549, 556, *supra*), but before probable cause based on hearsay is found it must appear, in the language of the *Aguilar-Spinelli* rules, that the informant has some basis of knowledge for the information he transmitted to the police and that the information is reliable (*People* v. *Landy*, *supra*, 375; *People* v. *Rodriguez*, *supra*, 488-489; *People* v. *Hanlon*, *supra*, 558; *cf. Illinois* v. *Gates*, 462 US 213, *supra*). The basis of the informant's knowledge must be demonstrated because his information, whether reliable or not, is of little probative value if he does not have knowledge of the events he describes (*People* v. *Rodriguez*, *supra*, p 491). Conversely, no matter how solid his basis of knowledge, the information will not support a finding of probable cause unless it is reliable. Since police officers may not arrest a person on mere suspicion or rumor, they likewise may not arrest a suspect on the basis of

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[2] The statute uses the words "reasonable cause" (*see*, CPL 140.10). There is at least a technical distinction in the necessary quantum of underlying evidence between an arrest made with reasonable cause (which is usually equated with probable cause) to believe that defendant has committed a crime and a search based upon probable cause to believe that contraband will be found in a certain place (*see*, *People* v. *Lombardi*, 18 AD2d 177, 180, *affd* 13 NY2d 1014; *and see*, *generally*, 1 LaFave, Searches and Seizures § 3.1 *et seq.* [1978]). For purposes of this appeal, however, the inquiry is the same because both deal with probable cause.

an informant's tip, perhaps born of suspicion or rumor or intentional fabrication. Abreu's statement was based upon personal knowledge and thus on this appeal we are concerned solely with his reliability.

When the courts talk about the informant's reliability, they are usually talking about his "track record", his past performance as a supplier of information (*see*, *People* v. *Rodriguez*, 52 NY2d 485). Another obvious form of verification would be an oath (*see*, *People* v. *Wheatman*, 29 NY2d 337, 345-346, *cert den sub nom Marcus* v. *New York*, 409 US 1027, reh *denied* 409 US 119) or an admission against penal interest which serves the function of an oath (*see*, *People* v. *Comforto*, 62 NY2d 725; *United States* v. *Harris*, 403 US 573). The informant's veracity may also be established by other means showing the reliability of the information itself (*see*, *People* v. *Comforto*, *supra*, 727; *see*, *generally*, *Roe*, *Illinois* v. *Gates: Restructuring Hearsay Analysis in Probable Cause Determinations*, 35 Syracuse L Rev 1067, 1078-1086 [1984]). In the present case, the record does not contain anything to substantiate Abreu's past performance as an informant and his statement was not given under oath. The People urge, however, that reliability was established either by the admissions against penal interest found in his statement (*see*, *People* v. *Comforto*, *supra*; *People* v. *Wheatman*, *supra*), or by police investigation which corroborated the details of his statement (*see*, *People* v. *Elwell*, 50 NY2d 231, 237; *People* v. *Alaimo*, 34 NY2d 187).

Statements against penal interest are admissible at trial as exceptions to the hearsay rule because the declarant's interest against being criminally implicated gives reasonable assurance of the reliability of his statement (*see*, *People* v. *Maerling*, 46 NY2d 289, 295-298; *People* v. *Brown*, 26 NY2d 88; *People* v. *Egan*, 78 AD2d 34, 36-37). This general assurance of reliability also has been deemed sufficient when assessing hearsay information necessary to support probable cause determinations (*see*, *People* v. *Comforto*, *supra*; *United States* v. *Harris*, 403 US 573, *supra*; *see*, *generally*, LaFave, *supra*, § 3.3[c]). Such admissions are not guarantees of truthfulness and they should

be accepted only after careful consideration of all the relevant circumstances of the case indicates that there exists a basis for finding reliability. Nevertheless, admissions against penal interest have been held sufficient to support a finding of probable cause even though the informant has little to lose and much to gain by supplying information to the police in which he incriminates himself (*see*, *People* v. *Comforto*, *supra*; *People* v. *Rodriguez*, 52 NY2d 483, 490), or though his admissions incriminate him of criminal conduct less serious than the crime under investigation (*see*, *People* v. *Comforto*, *supra*; *United States* v. *Harris*, *supra*). The reason they are accepted is that the informant's identity is known to the police and they may use his statement admitting criminal conduct against him if his information is false (*see*, LaFave, Search and Seizure § 3.3[c], pp 525-534). The inculpating admissions thus serve the same purpose as a false statement under oath by placing the informant in jeopardy if he attempts to deceive or mislead the police.

In this case the People contend that Abreu's statement contains admissions of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]) and Criminal Facilitation in the Fourth Degree (Penal Law § 115.00[1]). Manifestly, Abreu did not admit possession of the revolver in his statement and, to support their position, the People claim that trial evidence of possession incriminated him. That is not sufficient, however, because the trial evidence was not known to Detective Weiting at the time of defendant's arrest and thus it could not provide him with any assurance at that time that Abreu was telling the truth. Nor do the People fare any better with their claim of facilitation. A person is guilty of criminal facilitation when, believing it probable that he is rendering aid to a person intending to commit a crime, he "engages in conduct which provides such person with the means or opportunity" to commit the crime and which in fact "aids such person to commit the crime" (Penal Law § 115.00[1]). Facilitation requires assistance to a person who intends to commit the crime at the time aid is given and who subsequently commits it (*People* v. *Gordon*, 32

NY2d 62, 64-65). To establish facilitation, the People rely on Abreu's conduct in assisting others to trade a rifle for the revolver used to kill Alcantara. That conduct occurred two months before the present crime was planned or occurred. Neither it, nor the other crimes mentioned in the statement, could support a charge of facilitation because nothing indicates that at the time Abreu and the others procured the revolver defendant and Di Prospro intended to rob Alcantara's store or the other businesses mentioned in Abreu's statement, or that Abreu knew they intended to use the revolver for those robberies.

Nor was the information corroborated by independent police investigation. In his statement Abreu had asserted that Di Prospro told him that Di Prospro had been picked up by the police earlier but they had released him because "they did not have anything on him." That was true, to the knowledge of the police, but it hardly constituted corroboration sufficient to establish the reliablity of the rest of Abreu's statement as the People contend (*see*, *People* v. *Wirchansky*, 41 NY2d 130 and *compare People* v. *Alaimo*, 34 NY2d 187).

Thus, if probable cause is to be found in this case it must be based upon the test recently announced by the Supreme Court in *Illinois* v. *Gates* (462 US 213, *supra*).

In the *Gates* case, the police conducted an authorized search of defendant's home and car which produced evidence supporting convictions on drug charges. The papers submitted to the magistrate to support the warrant application relied on a detailed anonymous letter alleging the defendants were engaged in drug trafficking. That information was subsequently corroborated in part by the investigation of the police. Although the letter failed to demonstrate the informant's basis of knowledge, the Supreme Court upheld the magistrate's determinations of probable cause. In doing so, the court abandoned the *Aguilar-Spinelli* test in favor of a new "totality of the circumstances" analysis for reviewing probable cause determinations. Under the *Gates* rule, the familiar two-prong test no

longer need be satisfied. Basis of knowledge and reliability are not essential findings in a probable cause determination but, rather, only relevant considerations. It is sufficient that the issuing magistrate makes a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him including reliability and basis of knowledge, there is a fair probability" that the evidence sought will be located in the place in which the warrant authorizes the search. The duty of an appellate court, reviewing a magistrate's determination, is to do no more than insure that there was a substantial basis for the magistrate's conclusion that probable cause existed (*Illinois* v. *Gates*, 462 US 213, *supra*, at 238). Thus, under the *Gates* formulation, not only is the legal conclusion of probable cause to be made in a "practical common-sense" way but also a subjective standard of trustworthiness is to be used, free of fixed rules, to determine the factual predicate on which the magistrate's legal conclusion rests.

Gates involved a search warrant and the court's reasoning relies heavily on the fact that the determination of probable cause was made by a detached and neutral magistrate. Thus, a large part of the court's justification for adopting the new rule rests upon its view that, in assessing probable cause, the appellate courts prefer determinations made by a magistrate issuing a warrant over those based upon the "hurried judgment" of law enforcement officers engaged in investigating crime (*Illinois* v. *Gates*, 462 US 213, supra, at 235-236), a preference this Court has also expressed (*see*, *People* v. *Elwell*, 50 NY2d 231, 241-242, *supra; People* v. *Hanlon*, 36 NY2d 549, 558-559). The importance of that consideration was emphasized by the language of the Supreme Court opinion which reaffirmed prior decisions stating that the use of warrants should be encouraged, by several statements that reviewing courts should accord great deference to the magistrate's determination of probable cause (462 US 213, *supra*, at 230-232, 239), and by references to the protections afforded by limitations on a magistrate's power to approve a warrant (*id.* 239). Noting that warrant applications are commonly drafted by

non-lawyers who should not be hobbled by technical rules (*id.* 236), the court stated that applications are to be interpreted in a common-sense, not a hypertechnical manner. Finally, the court noted that warrants were to be encouraged because the use of search warrants greatly reduces the perception of unlawful or intrusive police conduct by insuring the person whose property is being searched or seized of the lawful authority of the executing officer and the limits of his power (*id.* 236).

These several arguments suggest that the rule may not apply to situations involving warrantless arrests and searches and, as a matter of State constitutional law, we decline to so apply it. In so holding, we note that this Court has repeatedly stated that the proscription against unlawful searches and seizures contained in section 12 of article I of the New York State Constitution conforms with that found in the Fourth Amendment, and that this identity of language suppports a policy of uniformity between State and Federal courts. Thus, in the past, we have chosen to fashion our rules to promote consistency in the interpretation we have given to the two clauses (*see, e.g., People* v. *Gonzalez*, 62 NY2d 386, 389-390; *People* v. *Ponder*, 54 NY2d 160, 165; *People* v. *Roman*, 53 NY2d 39, 41-42). The practical considerations upon which uniformity rests must yield, however, to a predictable, structured analysis of the quality of evidence necessary to support intrusive searches and seizures. Certainly, when the Supreme Court has not addressed a specific issue or provided guidance for such an analysis in its Fourth Amendment rulings, we may, as we have in the past, choose to judge the lawfulness of the police conduct by the standards of our state constitution (*see, e.g., People* v. *Gokey*, 60 NY2d 309; *People* v. *Elwell*, *supra*; *People* v. *Belton*, 55 NY2d 49). This appeal presents one of those situations in which we believe that the aims of predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens are best promoted by applying state constitutional standards. In doing so we also

provide "bright line" guidance to police personnel in performing their duties (*see*, *People* v. *Belton*, 55 NY2d 49, 55, *supra*).

As a result of defendant's illegal arrest, the prosecution obtained two statements from him which were introduced at trial; the first, a written statement made about an hour and a half after his arrest and the second, a videotaped statement made four and a half hours after arrest. The burden rested upon the People to demonstrate that the statements were not acquired by exploitation of the arrest but by means sufficiently distinguishable from it to be purged of illegality (*see*, *generally*, *People* v. *Martinez*, 37 NY2d 662). The relevant considerations for determining that were whether some intervening event broke the causal connection between defendant's arrest and the making of the statements, specifically "the temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct" (*Brown* v. *Illinois*, 422 US 590, 603-604; *see*, *also*, *Dunaway* v. *New York*, 442 US 200; *Taylor* v. *Alabama*, 457 US 687).

This case is virtually identical to *Dunaway* and *Taylor*. In *Dunaway*, the defendant made a statement within an hour of his arrival at the police station and in *Taylor*, defendant made a statement six hours after his arrest. There was no intervening events in either case to break the causal connection between the arrests and the statements. In this case, the elapsed time was one and one-half and four and one-half hours between arrest and statement. The People do not contend that anything happened to attenuate the taint of the illegal arrest; rather, they base their entire case on the claim that the arrest was legal. We hold otherwise.

Accordingly, the order should be reversed, motion to suppress granted and the case remitted to Supreme Court, Bronx County for further proceedings on the indictment.[3]

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[3] Insofar as the concurring judges contend that exclusion is a common law rule rather than a constitutional doctrine under New York law, we would but add that, notwithstanding the history they recite, the Court has excluded evidence on state constitutional grounds in the past (*see, e.g., People* v. *Class*, 63 NY2d 491; *People* v. *Gokey*,60 NY2d 309; *People* v. *Elwell*, 50 NY2d 231). Indeed, one of the concurring judges, contrary to the position he now advances, has previously voted to suppress evidence admissible under the Fourth Amendment on state constitutional grounds (*see, People* v. *Gokey, supra*).

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Titone, J. (concurring)

I agree with the majority that there should be a reversal, but cannot join its opinion which establishes an exclusionary rule under our State Constitution, thus amending the constitution in a fashion explicitly rejected by the delegates to the 1983 Constitutional Convention, and overruling three decisions *sub silentio* (*People* v. *Richter's Jewelers, Inc.*, 291 NY 161 [Lehman, Ch. J.]; *People* v. *Defore*, 242 NY 13 [Cardozo, Ch. J.], *cert. denied* 270 US 657; *People* v. *Adams*, 276 NY 351, *affd* 192 US 585). As shall be demonstrated, exclusion of evidence is not a command of Article I, section 12, of the State Constitution. Rather, it is a judicially declared rule of evidence which the legislature is free to abrogate.

The question of whether evidence obtained in a lawless fashion should be inadmissible was first addressed by us in *People* v. *Adams* (*supra*). In accordance with the then settled common law rule, we held that "the matter in which the witnesses became possessed of the evidendce is a matter of no importance" (*People* v. *Adams*, *supra*, p 359).

Following the Supreme Court's adoption of an exclusionary rule in federal prosecutions (*Weeks* v. *United States*, 232 US 383), then Chief Judge Cardozo reexamined the subject in *People* v. *DeFore* (242 NY 13, *supra*), the seminal opinion in the nation (*see* 7 Wigmore, Evidence, §§ 2183, § 21184a [McNaughton rev 1961]). In his ever eloquent style, Cardozo explained why the common law rule adopted in *Adams* remained sound, and that the "Legislature * * * has acquiesced in the ruling of this Court that the prohibition of the search did not anathematize the evidence yielded through the search * * *. We must hold it to be the law until those organs of government by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass" (*People* v. *Defore*, *supra*, p 25).

In subsequent years, none of the "organs of government" acted favorably on any proposal to depart from *Defore* (*see*, *Sackler* v. *Sackler*, 15 NY2d 40, 42). More important, the Revised Record of the New York State Constitutional Convention of 1938, at which Article I, Section 12, of the State Constitution prohibiting unreasonable searches and seizures was adopted, contains unequivocal authority for the proposition that the exclusionary rule does not exist as a constitutional remedy.

Two major proposals were considered relating to unreasonable searches and seizures at the 1938 Constitutional Convention. The first, introduced by Senator Dunnigan, contained a prohibition against the use of evidence unlawfully obtained.[1] The second proposal, introduced by the Bill of Rights Committee, contained no such prohibitory clause and reflected Civil Rights Law section 8. The merit of each proposal was debated at great length (Revised Record of the New York State Constitutional Convention of 1938, Vol. I, pp 406-594). The Dunnigan proposal, which would have established a constitutional bar against unreasonable searches and seizures, coupled with an exclusionary rule, was sharply criticized by a number of the delegates.

Chief Judge Cardozo's view that adoption of an exclusionary rule was a task for the political branches of government was reiterated by delegate H.E. Lewis, who aptly stated:

> "It is interesting to note that although in the *Defore* case Judge Cardozo said if there is to be any change making the use of evidence illegally obtained inadmissible, it should be by legislative fiat, and even though that decision is twelve years old no Legislature—and during that time Senator Dunnigan has been there all those years, I think he said—no legislature has ever dared suggest the prohibition of the

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[1] The Dunnigan proposal provided, in part, "Evidence obtained in violation of this section shall not be received in any hearing, trial or proceeding." (Record, Vol 1, at pp 406-407.)

use of evidence where it involves incriminating acts." (Record at p 426.)

In addition, the relative permanence of the constitutional change contemplated by the Dunnigan proposal was not overlooked. As noted by delegate Reigelman:

> "Mr. President, this is not a statute we are considering. A statute can be quickly repealed if we make a mistake. It is the Constitution, a basic and presumably permanent document, and one that cannot be readily changed. We are asked to write into that document the principle not merely that certain rights shall not be invaded, not only that the law-enforcement officer who invades those rights may be subject to punishment, but that the victim of the invasion, however vicious, however brutal, however dangerous to society he may be, and however atrocious his offense, might have the additional compensation and benefit of going free. To do otherwise, we are told, is to place the State in the indefensible position of taking advantage of its own wrong. I think that that is a sheer sophistry. It is based, in my opinion, upon an obvious confusion of thought." (Record, at p 416.)

Subsequent to the lengthy debate, and after citation to Cardozo, Holmes and Wigmore, the proposal of the Bill of Rights Committee, which lacked the prohibitory clause, was advanced by the Committee of the Whole. By a vote of 90 (aye) to 69 (no), the delegates approved the proposal of the Bill of Rights Committee, and it was subsequently fully indorsed. Thus, the Convention rejected the Dunnigan proposal, which contained a provision mandating the exclusion of evidence, incorporated Civil Rights Law section 8 into the State Constitution, and retained the *Defore* rationale.

Nonetheless, in 1943 argument was made to this Court that the mere inclusion of a bar against unreasonable searches and seizures in the State Constitution compelled the adoption of an exclusionary rule (*People* v. *Richter's Jewelers*, 291 NY 161, *supra*). Chief Judge Lehman explained that the *Defore* rule remained unchanged and that it was beyond the power of this Court to adopt the rule by decisional law. His cogent analysis

cannot be improved upon and states my position precisely and concisely (*id.* at 168-169):

> "Since that decision [*People* v. *Defore*, *supra*], no 'organ of government' has given notice to the courts that the change has come to pass. True, the immunity from unreasonable search and seizure is no longer a creature of statute, for in 1938 the statute was incorporated in the Constitution. The language remains the same as the language of the Civil Rights Law when this court defined its scope in *People* v. *Defore (supra)* and is the same as the language of the Federal Constitution. Doubtless if the effect of that language had not been previously determined authoritatively by this court and if the Legislature had not for almost forty years acquiesced in that ruling, argument might be made that ordinarily the same language in the Constitution of the State of New York and in the Constitution of the United States should be given the same effect and that a sound public policy dictates the conclusion that the constitutional right of immunity of the individual from unreasonable search and seizure should be implemented by rejection of evidence obtained by public officers in violation of the rights of the individual. Even now the Legislature may, if it chooses, give heed to such arguments. This court cannot properly do so.
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> "The framers of the new section of the Constitution were fully informed that in this State the rule was firmly established by old decisions that rejection of evidence obtained by a public officer through unreasonable search and seizure is not the legal consequence of the officer's trespass. Certainly it cannot be said that the incorporation of the statutory prohibition into the Constitution without change of language was intended to change the scope and effect of the prohibition in a matter of grave importance about which much controversy had raged and is still raging. The intention to leave the rule unchanged is clear even without resort to the proceedings of the convention, and examination of those proceedings merely confirms that conclusion. There is room for discussion whether the convention acted wisely in rejecting proposals to change the New York rule formulated in *People* v. *Defore*. There is hardly room for discussion that the convention decided that no change in the rule should be made by it, leaving the Legislature free, as it had been before, to determine

whether and in what circumstances evidence obtained by trespass should be rejected."

It thus cannot be urged that an exclusionary rule was engrafted upon Article I, section 12, by implication or otherwise.

In 1961, the Supreme Court, overruling prior precedent (*Wolf* v. *Colorado*, 338 US 25), held in *Mapp* v. *Ohio* (367 US 643), that evidence obtained in violation of the Fourth Amendment, made applicable to the states through the due process clause, was inadmissible in a state criminal prosecution. We followed *Mapp* on constraint, observing that *People* v. *Richter's Jewelers (supra)*, *People* v. *Defore (supra)* and *People* v. *Adams* (supra) otherwise remained authoritative (*see*, *People* v. *Loria*, 10 NY2d 368, 370). In *Sackler* v. *Sackler* (15 NY2d 40, 42, *supra*), Chief Judge Desmond remarked that the State rule had not otherwise been changed: "Nowhere, as all admit, is there any constitutional, statutory or decisional authority for rejecting otherwise valid evidence on * * * [the] ground [of illegal entry]. Our State's prohibition against unreasonable search and seizures (NY Const, art I, § 12; Civil Rights Law § 8) do not have that purpose or effect." (*See, also*, *People* v. *Horman*, 22 NY2d 378, 381, *cert denied* 393 US 1057; Richardson on Evidence, §§ 558, 560 [10th ed].) Further, as has the Supreme Court (*United States* v. *Caladrea*, 414 US 338, 347), we have rejected the notion that the exclusionary rule operates as some sort of personal constitutional right of the party aggrieved, embracing, instead, the Supreme Court's concept that the exclusionary rule is a judicially created remedy designed to protect privacy values generally through its deterrent effect (*People* v. *Young*, 55 NY2d 419, 425; *People* v. *Adams*, 53 NY2d 1, 9 *cert. denied* 454 US 854; *People* v. *McGrath;* 46 NY2d 12, 21, *cert denied* 440 US 972).

Recently, the pendulum has swung: the Supreme Court has tended to read its prior decisions interpreting the Fourth Amendment narrowly. This Court has generally followed a policy of uniformity so that police officers and lower courts will have the benefit of a clear bright-line rule (*e.g. People* v.

Gonzalez, 62 NY2d 386, 389-390; *People* v. *Ponder*, 54 NY2d 160). As we put it in *People* v. *Ponder* (*supra*, p 165), "section 12 of article I of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts."

In a few cases, however, this Court has declined to read the Fourth Amendment and article I, § 12, of the State Constitution as coextensive and has suppressed evidence on state grounds (*see, e.g. People* v. *Gokey*, 60 NY2d 309; *People* v. *Elwell*, 50 NY2d 231). But not one of these cases purports to overrule *People* v. *Richter's Jewelers* (291 NY 161, *supra*), *People* v. *Defore* (242 NY 13, *supra*) or *People* v. *Adams* (176 NY 351, *supra*) and they are inconsistent with the analysis in *People* v. *Gonzalez* (62 NY2d 386, 389-390, *supra*), a subsequent decision. It appears that the question of whether an exclusionary rule is supported by article I, § 12, of the State Constitution,[2] was not raised by the parties and in fact it has not been raised here. Whether the exclusionary sanction implicitly adopted is constitutionally based, or a product of a "judicially declared rule of evidence" (*People* v. *Cahan*, 44 Cal2d 434, 442, 282 P2d 905, 910 [Traynor, J.]) which the legislature is free to abrogate, was not discussed.

From a purely *stare decisis* viewpoint, these are "odd cases" which should now be rejected (*People* v. *Hobson*, 39 NY2d 479, 487). As former Chief Judge Breitel put it, "*Stare decisis*, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the patricide receiving mercy because he is an orphan. The

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[2] Our right to counsel decisions are, of course, not on point. Those decisions rest upon a different section of the State Constitution (NY Const, art I, § 6), with a different historical backdrop "independent of its Federal counterpart" (*People* v. *Settles*, 46 NY2d 154, 161).

odd case rode roughshod over *star decisis* as their legitimate right, whether or not they express sound, good or acceptable doctrine" (*People* v. *Hobson*, *supra*, p. 487).

In England, where the entire doctrine of *stare decisis* originated with the birth of the common law, it is basic "that where material cases * * * which show that a court has decided a case wrongly were not brought to its attention the court is not bound by that decision in a subsequent case" (*Nicholas* v. *Penny* [1950] 2 KB 466, 473; *see also*, *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] KB 718). The same principle has been followed by this Court (*e.g. Rowland* v. *Mayor*, 83 NY 372, 377 ["the point now presented, * * * (was not a) matter of argument or in any way involved in the (subsequent) decisions"]; *cf. People* v. *Hobson*, 39 NY2d 479, *supra*) and other American courts (*e.g. Chapman* v. *Dorsey*, 230 Minn 279, 41 NW2d 438, 443; *State* v. *Mellenberger*, 163 Ore 233 95 P2d 709, 719; *see*, Comment, Stare Decisis in Courts of Last Resort, 37 Harv L Rev 409).

More important, the doctrine of *stare decisis* cannot be invoked to sustain a decision which is in conflict with the State Constitution. Our analysis in *Board of Educ. of Cent. School Dist. No. 1* v. *Allen* (20 NY2d 109, 117, *affd* 392 US 236) is squarely on point: "We cannot perpetuate an erroneous interpretation of the State Constitution merely because it is contained in the reports of this court."

This does not, however, end the matter. Although, as has been shown, our State Constitution does not support an exclusionary rule, decisions like *People* v. *Gorkey, (supra)* might well be explained on the ground that the challenged search and seizure was *substantially* unreasonable, but *procedurally* exclusion is required as a judge made common law rule of evidence (*see*, *Coolidge* v. *New Hampshire*, 403 US 443, 493, 498 [Black, J., concurring]; *People* v. *Cahan*, 44 Cal2d 434, 442, 282 P2d 905, 910 *supra*), and if the legislature were to negate that judge made rule, as it is unquestionably empowered to do, and declare that henceforth courts in this State may not

exclude evidence seized in violation of the State Constitution unless exclusion be required by the federal constitution, the search would still be illegal and might support a tort action, but we would be compelled to honor the legislative judgment (*see, In re Lance W.*, 37 Cal3d 873, 888, 694 P2d 744, 752; *State* v. *Larazzoli*, 434 So2d 321, 323 [Fla]). This approach is consistent with that recommended in a leading evidentiary text: "An extensive literature has built up concerning rights under state law that may be enforceable by means of an exclusionary sanction. * * * Most of this discussion, however, fails to distinguish between developments of rights under state law, on the one hand, and the development of an exclusionary sanction to remedy violations of these rights, on the other" (McCormick, Evidence [3d ed], § 166, p 449 n. 1).[3]

To be sure, the approach also has its drawbacks. It certainly seems inconsistent with the public policy expressed in *People* v. *Richter's Jewelers (supra)* and *People* v. *Defore (supra)* of deferring to the legislative branch in the first instance. But given what some might perceive to be a change in public policy, arguable legislative acquiesence, and the ability of the legislature to overturn such a judge made rule, it seems like the most preferable course (*see*, Stewart, The Road to Mapp v Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum L Rev 1365, 1396-1399). After all, the common law of evidence is constantly being refashioned to meet the demands of modern societal expectations (*cf. Fleury* v. *Edwards*, 14 NY2d 334, 341). Certainly, that approach is better than creating a constitutional precedent, which will be a non-precedent, based as it is on an erroneous interpretation of the State Constitution (*see*,

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[3] I note with interest that the gap in jurisprudential analysis is not limited to New York (*compare, e.g. State* v. *Alston*, 88 NJ 211, 440 A2d 1311 and *State* v. *Johnson*, 68 NJ 349, 346 A2d 66 *with State* v. *Smith*, 37 NJ 481, 181 A2d 761 and *Eleuteri* v. *Richman*, 26 NJ 506, 511, 141 A2d 46, 49).

Board of Educ. of Cent. School Dist. No. 1 v. *Allen*, 20 NY2d 109, 117, *supra*).[4]

On the merits, I note that the Supreme Court has not yet passed on whether *Illinois* v. *Gates* (462 US 213) and *United States* v. *Leon* (___ US ___, 104 S Ct 3405) will apply to warrantless seizures, though the issue is apparently presented by *California* v. *Ciraolo* (No. 84-1513, ___ US ___, 105 S Ct 2672, *granting cert* to 161 Cal App 3d 1081, 208 Cal Rptr 93) (*see, generally*, Kasmisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L Rev 551, 581-584), and it has been the custom of this court to decide unsettled questions of constitutional law upon federal grounds, and to accorder broader rights to an accused only after the Supreme Court has declined to do so. I would continue to follow that policy.

Our decisions nevertheless do provide ample support for the result reached today. We have emphasized that an assessment of probable cause turns on what was reasonably and objectively, in the mind of law enforcement authorities (*People* v. *Jennings*, 54 NY2d 518, 523; *People* v. *Adams*, 53 NY2d 1, 9,

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[4] Parenthetically, it is not at all clear that our decision is insulated from United States Supreme Court review. The message eminating from *Michigan* v. *Long* (463 US 1032) and Chief Justice Burger's concurring opinion in *Florida* v. *Cassal* (462 US 637) is that the rights of the People may not be defeated on independent state grounds where the voters of the state have explicitly precluded their courts from adopting an exclusionary rule broader than that required by the federal constitution (*cf. Parrot* v. *City of Tallahassee*, 381 US 429; *NAACP* v. *Alabama ex rel. Patterson*, 357 US 449; *Staub* v. *City of Baxley*, 355 US 313; Hill, The Inadequate State Ground, 65 Colum L Rev 1251), as demonstrated by the grant of certiorari in *New York* v. *Class* (___ US ___, 105 S Ct 1863, 63 NY2d 491), a case the majority states was decided purely on State Constitutional grounds. This case is of moment because the court finds a *Dunaway* v. *New York* (462 US 200) violation and, ironically, the Supreme Court's reversal made that rule binding on us. We had declined to adopt the *Dunaway* rule as a matter of federal or state law.

cert denied 454 US 854). The "good faith" exception to the exclusionary rule is not applicable simple because the officer has a "'white heart and empty head'" (*People* v. *Jennings*, *supra*, p 523), and in this case application of the exclusionary rule would deter "gut hunch" warrantless arrests (*cf. People* v. *Adams*, *supra*), though, at least arguably, a different result should obtain if a warrant be obtained in accordance with our preference for warrants (*see*, *e.g. People* v. *Hanlon*, 36 NY2d 549).

Here, the only evidence leading to defendant's arrest was the statement of an individual with no history of giving reliable information to the police and who exculpated himself from a homicide charge by implicating the defendant in the crime. There being no exigency, the police should have applied for a warrant, placing the informant under oath (*see*, *People* v. *Cantre*, 65 NY2d 790; *People* v. *Hicks*, 38 NY2d 90) or, at least, producing him before a magistrate (*People* v. *Brown* 40 NY2d 183). Because the officers did not do so, suppression is appropriate under the judicially formulated rule of exclusion.

For these reasons, I concur in the reversal, but not the majority opinion.

* * * * *

Order reversed, motion to suppress granted and case remitted to Supreme Court, Bronx County, for further proceedings on the indictment. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer, Kaye and Alexander concur. Judge Titone concurs in result in a separate opinion in which Judge Jasen concurs.

Decided November 26, 1985

State of New York)
) ss.:
County of New York)

MARK C. COGAN, an attorney duly admitted to the practice before the courts of this State, being duly sworn, hereby states under penalty of perjury:

That on December 3, the within Motion and Supplemental Brief was served upon The Honorable Mario Merola, District Attorney, Bronx County, 215 East 161st Street, Bronx, New York 10451, the address designated by him for that purpose, by depositing a true copy of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: New York, New York
December 3, 1985

/s/ MARK C. COGAN
Mark C. Cogan

Sworn to before me this
day of December 3, 1985

/s/ _____
NOTARY PUBLIC
King County
Reg. No. 4810465
Expires 3/30/86